No. 3057

1357 IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSON, and ED WARD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.

HAWLEY & HAWLEY,
J. R. SMEAD,
Attorneys for Plaintiffs in Error.

CLAUDE W. GIBSON,
WILLIAM HEALY,
Of Counsel for Plaintiffs in Error.

Filed *1923*

..... *Clerk*

No.....

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSON, and ED WARD,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.

HAWLEY & HAWLEY,
J. R. SMEAD,
Attorneys for Plaintiffs in Error.

CLAUDE W. GIBSON,
WILLIAM HEALY,
Of Counsel for Plaintiffs in Error.

Filed..... *1923*

..... *Clerk*

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSON, and ED WARD,

Plaintiffs in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division.

STATEMENT OF THE CASE

Plaintiffs in error, together with five others, were indicted in the District Court of the United States for the District of Idaho upon an indictment containing six counts, to-wit:

1. The first count charged a conspiracy to possess for sale certain intoxicating liquors.

2. The second count charged a conspiracy to engage in the business of selling intoxicating liquors at retail and wholesale.

3. The third count charged a conspiracy to manufacture intoxicating liquor.

In each of the first three counts the indictment set out seven overt acts alleged to have been committed in furtherance of the respective conspiracies, as follows:

That Plaintiff in Error Sorenson and his wife, Edith Sorenson, on January 10, 1923, obtained and had in their possession certain intoxicating liquors at the Vernon Hotel in Boise, Idaho; that Edith Sorenson, originally one of the defendants, having been arrested, Plaintiffs in Error Goodfriend and Kinney supplied $500.00 as her bond for appearance; that one Ed Kemp a defendant, on or about the 15th day of January, 1923, had in his possession five gallons of intoxicating liquor on the ranch of J. H. Evans, another defendant; that said Ed Kemp, on the 15th day of January, 1923, also had in his possession on the Evans ranch about 45 gallons of intoxicating liquor; that the said Ed Kemp, on the same date and at the same place, had in his possession certain distilling apparatus; that the said Ed Kemp having been arrested on the 15th day of January, 1923, for violation of the national prohibition act, Plaintiff in Error Goodfriend furnished a cash bond for him in the sum of $1,000.00, and finally, that Defendant Carl Sorenson having been arrested on January 26, 1923, Plaintiff in Error Goodfriend became one of his bondsmen in the penal sum of $1,000.00.

The last three counts of the indictment were as follow:

4. That the plaintiffs in error, together with other defendants referred to, had in their possession and

under their control, certain distilling apparatus set up for operation without first having registered the same with the Collector of Internal Revenue for the District of Idaho.

5. Plaintiffs in error and said other defendants did carry on the business of a distiller without having given a bond as required by law, and engaged in said business with intent to defraud the United States of the tax on the spirits distilled by them.

6. That plaintiffs in error and said other defendants did make and ferment in a building and on premises other than a distillery duly authorized, according to law, a quantity of mash, wort and wash fit for and designed for distillation.

The three conspiracies charged against the parties were each alleged to be entered into on or about the first day of December, 1922; the three charges in the last three counts of the indictment were each dated January 15, 1923.

The defendants all entered pleas of not guilty except the defendant, J. H. Evans, who was never arraigned or prosecuted, and who was called as a witness for the Government on the trial of the case.

The case was tried at the February, 1923, term of said Court; Defendant Edith Sorenson became ill during the trial and was unable to be present after the first day or two, and as to her a mistrial resulted; the case was dismissed as to the defendant Ed Hill on motion of the District Attorney at the close of the evidence, Defendant Henry Griffith was found not guilty, Defendant J. H. Evans has never been tried,

and plaintiffs in error on this appeal were each found guilty on each of the six counts of the indictment.

At the opening of the trial a motion was made that the Government be required to elect between the three conspiracy counts and the three last counts of the indictment, on the ground that the two sets of offenses were not of the same character or class, and therefore improperly joined. This motion was denied. Leave was then asked to withdraw temporarily the pleas of not guilty in order that defendants might move to quash the indictment. Leave was denied, and exceptions were taken to both rulings. (Transcript pp. 52-54.)

Defendant Griffith was Chief of Police of Boise City. Defendant Hill was Captain of Detectives on the police force under Griffith; Defendant Agnew was the Sheriff of Ada County, Idaho, in which Boise is located. Defendant Kinney was his office deputy; Defendant Goodfriend is a local physician in Boise; Defendants Sorenson and wife were the proprietors of the Vernon Hotel in Boise; Defendant Ed Kemp is a tradesman of Boise, and Defendant Ed Ward is a laborer and former liveryman of that place. Defendant Evans was a resident of Gooding, Idaho, a considerable distance from Boise, and also the owner of a small piece of property lying about two miles from Boise and adjoining a similar tract which was the residence of Dr. Goodfriend.

It developed at the trial that Defendant Goodfriend had rented the Evans place on two or three occasions to different parties, acting for Mr. Evans, and about the first of December, 1922, rented it to Defendant

Ed Kemp after calling Mr. Evans on the telephone concerning the proposed transaction. For a long time prior to that date the two Sorensons had been patients of Dr. Goodfriend, as had been the wife of Defendant Kemp. Goodfriend had also been somewhat active in local politics and during the preceding summer had been actively opposed to the candidacy of Sheriff Agnew for renomination at the primaries. Agnew was renominated, however, and through a change of deputies in his office he and Goodfriend became reconciled and Goodfriend later supported him for election. Mr. Agnew was elected and Kinney was retained as his office deputy. Growing out of the support of Agnew by Goodfriend during the campaign of 1922, Agnew visited Goodfriend's office at times before and after the election, as also did Kinney. The Sorensons were frequent callers for professional reasons at Dr. Goodfriend's office, and Defendant Ed Ward called there for similar reasons a few times. Chief Griffiths called at Dr. Goodfriend's office on one or two occasions about the first of the year 1923, and it was both affirmed and denied that Defendant Hill had been there on a few occasions.

The theory of the Government's case was that somewhere around the first of December, Goodfriend, the Sheriff, his Deputy, the Chief of Police and Captain of Detectives entered into a conspiracy to violate the National Prohibition Act and to this end they obtained Defendant Kemp and assisted him financially and otherwise to equip a distilling plant on the tract of land owned by Defendant Evans next to the Good-

friend residence tract, Goodfriend making the arrangements to rent the tract for Evans to Kemp and he and Sheriff Agnew actively participating in providing the distilling apparatus and supplies for the enterprise. The Government further contended that Defendants Sorenson, through their hotel, were to furnish a place to dispose of the product of the still, and that Defendant Ed Ward was likewise to act as salesman for the liquor. Evans was apparently indicted on the theory that he was one of the conspirators and knowingly let his property to be used for the purpose of setting up and maintaining a distillery.

The Government's entire case hinged upon the testimony of a woman, one Marie Curtis, who occupied two rooms in the Empire Building in Boise, one of which adjoined the private office of Dr. Goodfriend. This woman professed to have voluntarily undertaken a course of espionage upon Goodfriend's office, his callers and his activities, and professed to have overheard many conversations carried on between the doctor and others of the defendants, as well as a number of persons who were not complained of in any way; and it was upon her testimony that the Government based its case very largely. She professed to have heard and remembered several conversations in December, 1922, and that during the closing days of December and through January and February, 1923, she listened to other conversations and thereafter wrote them out in a series of notebooks which she kept for that purpose. Certain Prohibition Agents were sent to her office or room at a time after she claimed to

have commenced her operations and they also testified to having heard certain conversations which they afterwards wrote out at some length in the form of narratives. Only one of these, however, testified to anything of any particular importance as disclosed by the transcript of the evidence herein. This was one Oscar Kuchenbacher. One of the points presented by the plaintiffs in error deals at some length with the use of the alleged notes of these witnesses, and it is contended on this hearing that the testimony so adduced was not testimony of any recollection of the witnesses, but amounted merely to their reading of narratives composed by themselves at a time subsequent to the conversations and without any actual recollection on their part of the conversations and the other details about which they assumed to testify. The memoranda were not offered in evidence. (Pp. 128-315, Transcript.)

The Government also offered in evidence certain property, including a small quantity of intoxicating liquor, which had been seized at the Vernon Hotel on January 10, 1922, prior to the trial, during a search conducted there, ostensibly pursuant to a search warrant in their possession. It is likewise contended that the search was unwarranted and unlawful, and that the affidavit upon which the search warrant was issued was insufficient and the warrant itself insufficient to justify any search and that in fact the only search conducted and the only property seized was in a suite of rooms occupied in the hotel solely and exclusively as the private family residence of the defendants Sor-

enson and their son. No showing having been made sufficient to justify the search of such a dwelling, the Sorensons petitioned for the return of the property and that the search be declared illegal. These proceedings were originally had in a case at that time commenced against the two Sorensons for the maintenance of a nuisance and possession of intoxicating liquor. The petition was denied, and it was stipulated after the indictment in the case at bar was returned that the record of proceedings commenced by said petition should be made a part of the record in this case. (Transcript, pp. 27-49, 71-87.)

The Government also offered in evidence a large amount of property, including a considerable amount of intoxicating liquor which was seized on the Evans ranch on January 15, 1923, pursuant to a search warrant directed against that place, at which time Kemp was arrested and charged with possession of liquor and distilling apparatus. (Transcript, pp. 93-101.)

In an effort to connect the Plaintiff in Error Ed Ward with the case, the Government went at consider able length into a transaction alleged to have occurred at a place known as the Union Rooming House in Boise, which evidence dealt with the alleged sale by one Mrs. Goldsbury of a bottle of intoxicating liquor in December, 1922. The evidence produced by the Government showed that Defendant Ward had nothing to do with the Union Rooms except that he had a room there. One of the witnesses for the Government stated that Ward was present at the time the liquor was bought, but that he thought no one saw

the transaction but the witness himself and Mrs. Goldsbury. This procedure is also assigned as error on this appeal as a matter entirely disconnected and prejudicial to the rights of defendants. (Transcript, 59-71.)

In the course of the evidence, a number of conversations were attributed to Dr. Goodfriend as having been had with persons unknown to the witnesses. These are made the subject of certain assignments of error treated in this brief. It is contended by plaintiffs in error that such matters were not properly admitted because they were not shown to have any connection with the charge or to be in any way related to the alleged dealings between the defendants.

At one point in the testimony the Government brought before the jury an alleged detectaphone apparatus and over the objection of the defendants inquired at some length as to the operation of it, the quality of results obtained through it, and as to its having been placed in the Curtis rooms and the transmitter placed in Dr. Goodfriend's private office underneath his desk and attached by appropriate wires to the receiving apparatus in the Curtis rooms. After all of this matter had been gone into rather fully, and the fact had been brought out that certain parties undertook to listen to what was being said in Goodfriend's office, using this apparatus for this purpose, an objection was made to the whole matter on the grounds that it violated Goodfriend's constitutional rights, which was temporarily sustained by the Court for the purpose of looking further into the authorities. Shortly thereafter, the Government, having explained the instru-

ment to the jury and having established that it was set up in the Curtis rooms for the purpose of listening to what went on in Goodfriend's office, withdrew the offer of the apparatus. It is contended that it was error to permit the demonstration of this apparatus before the jury and to permit any testimony concerning it and its installation in the Curtis and Goodfriend offices, since it could not but leave in the jury's mind an inference that had the Government undertaken it could have produced a great deal more evidence that was obtained over the detectaphone. (Transcript, pp. 115-128, 141-150, 182.)

In the course of the examination of Marie Curtis at various times the defendants attempted by different questions to inquire into the relations of Marie Curtis with the organization known as the Ku Klux Klan and as to her activities on behalf of that organization, but on each occasion were denied the right to do so. Exceptions were taken to such rulings and those matters are also made the subject of assignments of error herein.

Repeatedly the Government brought up matters pertaining to the possible gambling at cards by Dr. Goodfriend, and was finally allowed to go into the question of his reputation for so doing over his objection. This is assigned as prejudicial error.

Repeatedly the defendants attempted to inquire whether or not the searches of the Vernon Hotel and of the Evans ranch were brought about through information acquired prior to those times through the espionage conducted at Dr. Goodfriend's office. The

Government's objections were sustained and defendants were also denied the privilege of introducing the affidavit and warrant pursuant to which the Evans ranch was searched for the purpose of showing by the documents themselves that the search was not brought about by anything heard or seen at Dr. Goodfriend's office. These matters are also assigned as error.

Error is also assigned on account of certain instructions given the jury by the Court, to the effect that they might find the defendants guilty under Counts 4, 5 and 6, respectively, of the indictment. These instructions were duly excepted to. (Transcript, pp. 447-450.) There was no evidence whatever touching the gist of the offenses in each of these counts, each being framed under one of the re-enacted revenue laws, to-wit: failure to register a still, failure to provide a distiller's bond, and the making of mash in a place other than a distillery. There having been no evidence that the still in question was not registered, that a distiller's bond was not furnished, or that the building in question was not a distillery established according to law, it is contended that the Court should either have ordered a dismissal of those charges or instructed to find the defendants not guilty on each.

At the beginning of the proceedings in this cause an application was made for an order requiring the Government to furnish a bill of particulars. This application was supported by the affidavit of the various defendants as required by law; the order for the bill of particulars was denied and defendants' exception pre-

served. (Transcript, pp. 451-467.) The denial of the bill of particulars in toto is assigned as error, it being contended herein that the Court abused his discretion in denying some, at least, of the requests for a more particular statement of the charge against the defendants.

The judgment pronounced against the defendants (p. 51) is of a general nature and does not specify on what count or counts the judgment is pronounced nor does it in any way refer to the specific findings of guilty on the different counts as contained in the verdict. (p. 49).

Exception was also taken to the verdict and error is assigned by defendants on the ground that the verdict was not supported by the evidence and is contrary to law. This is on the ground that three several and distinct conspiracies were found to exist, whereas such a finding was not justified by the evidence; and that the verdict combined a finding on three conspiracy counts depending on the National Prohibition Act and the general conspiracy statute and three other counts depending upon the Internal Revenue Laws; the National Prohibition Act making it unlawful to make, sell, dispose of or possess intoxicating liquor, and the Internal Revenue Laws referred to making the business of setting up a still, distilling and establishing a distillery lawful and requiring only that certain matters pertaining to registration, bond, etc., be complied with; it is contended that such a verdict as here rendered is contrary to law and also that it is unsupported by the evidence. This assignment of

SPECIFICATIONS OF ERROR

1. The Court erred in denying the motion for a bill of particulars prior to the trial. (Transcript, pp. 451-467.)

2. The Court erred in failing to require an election between the conspiracy charges and the charges under certain of the Internal Revenue Laws, as contained in the indictment. The motion was made at the beginning of the trial and renewed at the close, and on each occasion denied and exceptions taken. (Transcript, pp. 7-25, 53 and 446.)

3. The Court erred in refusing the defendants leave to make a motion to quash the indictment at the beginning of the trial. (Transcript, p. 55.)

5. The Court erred in permitting the witness, Goodenough, to testify concerning the purchase of intoxicating liquor from Mrs. Goldsbury in December, 1922, inasmuch as she was not a defendant and no connection appeared between the transaction and the issues of the case. (Transcript, pp. 59-65.)

6. The Court erred in permitting the witness Goodenough to testify to his conversation with the Prosecuting Attorney and the Deputy Sheriff about his alleged purchase of liquor from Mrs. Goldsbury, such conversations occurring without the presence of any of the defendants. (Transcript, pp. 62-62.)

7. The Court erred in permitting the witness Graven to testify to the same matters testified to by the witness Goodenough, above referred to. (Transcript, pp. 65-68.)

8. The Court erred in sustaining the Government's objection to the following question asked the witness Graven in connection with his other testimony:

Q. "And you didn't tell them at that time that you had gotten whiskey the day before at a time much earlier than you claimed to have gone to the Union Rooming House, did you?" (Transcript, pp. 66-67.)

9. The Court erred in permitting the Prosecuting Attorney for Ada County to testify concerning his conversation with Witnesses Graven and Goodenough concerning their alleged purchase of liquor from Mrs. Goldsbury, such conversation being outside the presence of any of the defendants and being hearsay. (Transcript, pp. 68-71.)

10. The Court erred in permitting evidence to be offered concerning what was seen and heard by Officers Steunenberg, Waggoner, Reynolds and Nickerson in the course of a search of the home of Plaintiff in Error Sorenson, January 10, 1923, at the Vernon Hotel, Boise, Idaho, because the evidence showed that such search was illegal and because the record theretofore made in this cause showed that the Court had erroneously denied said Sorenson's petition for the return of property seized in the course of said search and to have said search declared illegal. (Evidence of officers, Transcript, pp. 71-87; record of petition, hearing thereon and ruling, Transcript, pp. 28-49.) And further erred in the same connection in permitting the Government to put in evidence the property seized in the course of said illegal search in connection with testimony of the

officers above referred to, for the reasons already assigned.

11. The Court erred in denying the motion to strike out the testimony of the witness Steunenberg concerning the matters set forth in Assignment No. 10 listed above. (Transcript, p. 80.)

12. The Court erred in overruling the objection to the testimony of Officer Nickerson, above referred to, concerning the same matters set out in Assignment No. 10. (Transcript, pp. 80-84.)

13. The Court erred in overruling the objection to the testimony of Officer Reynolds concerning the same matters set out in Assignment No. 10. (Transcript, pp. 84-86.)

14. The Court erred in denying the defendant's objection to the testimony of Officer Waggoner concerning the matters set out in Assignment No. 10. (Transcript, pp. 86-87.)

15. The Court erred in refusing and denying the petition of Plaintiff in Error Sorenson to have the search of the Vernon Hotel declared illegal and to obtain return of the property seized in the course of said search. (Transcript, pp. 28-49.)

16. The Court erred in permitting the witness McCutcheon to testify concerning the commencement of an abatement action against the Vernon Hotel, and against Plaintiff in Error Sorenson and his wife, no connection being shown with the issues of this cause, and the effect of the testimony being prejudicial. (Transcript, p. 92.)

17. The Court erred in admitting in evidence two copies of printed periodicals under dates of March 16 and March 23, 1922, bearing the name and address of Plaintiff in Error Goodfriend and alleged to have been found in the house on the Evans ranch where certain distilling apparatus was seized and was later contended to be connected with this cause. Error is assigned because of the remoteness of the dates of the periodicals and because they are not shown to have ever been in Defendant Goodfriend's possession, nor was any connection established between them and the issues of this cause. (Transcript, pp. 95-98.)

18. The Court erred in refusing to permit Plaintiffs in Error to question Officer Reynolds as to whether the copy of the search warrant served on Defendant Ed Kemp at the time of a search of premises occupied by him, where distilling apparatus was seized, and later was contended to have been connected with Plaintiffs in Error, correctly stated the reasons for the search, and also as to whether the affidavits made by the witness correctly stated such reasons. (Transcript pp. 95-100.)

19. The Court erred in refusing the offer of the original affidavit for the search warrant used in searching the Evans place, where Defendant Ed Kemp was arrested and certain distilling apparatus seized, which affidavit showed what information and reasons led to such search. This was the same affidavit referred to in Assignment 18 just preceding. (Transcript, pp. 396-401.)

21. The Court erred in permitting the witness Robin Reynolds to explain and demonstrate before the jury a certain alleged detectograph apparatus and its operation and use. (Transcript, pp. 115-128, 182.) This is alleged as prejudicial in view of the references of other witnesses to the apparatus and the subsequent withdrawal of it by the prosecution.

22. The Court erred in refusing to permit the Plaintiffs in Error to obtain an answer from the witness Robin Reynolds in connection with the detectograph apparatus above referred to, to this question:

Q. "Haven't you heretofore stated about this particular instrument that if you had occasion to use it again you would want to send away and get a different form of transmitter?" (Transcript, p. 123.)

23. The Court erred in permitting the witness Robin Reynolds to set up and demonstrate the detectograph apparatus in response to the direction of the United States Attorney to set the same up as it was in the rooms adjoining Dr. Goodfriend's office. This assignment is in connection with Assignment 21 above and rests on the same grounds.

24. The Court erred in permitting the witness Marie Curtis to testify about the alleged conversation between Plaintiff in Error Goodfriend and Defendant Griffith concerning a place referred to as "Jap's place", which place was never otherwise connected with the issues of this cause, and erred in denying the motion to strike out her testimony concerning such conversation because the same was prejudicial and dealt with

matters not included in the issues of this cause. (Transcript, pp. 138-141.)

25. The Court erred in permitting the witness Marie Curtis to testify from her notes, in view of her statement that she had no independent recollection of the matters testified to, that she could answer no questions except by referring to her notes, that she selected from the conversations she claimed to have heard only what she concluded had a bearing on this case, that she could not, after consulting her notes to refresh her memory, tell as to what she claimed to have heard; that she did not attempt to make a complete record of the conversations as she heard them at the time when her record was written; and in permitting the witness to read from her notes to the jury and permitting her at times to state to the jury in other words what she considered her notes to mean. The notes were never offered in evidence, and there was no opportunity to object to the notes themselves. (Transcript, pp. 128-238.)

26. The Court erred in permitting the witness Marie Curtis to testify to a conversation between the Defendant Goodfriend and a man unknown to the witness concerning the defendant's telephone line about February 8, 1923. (Transcript, p. 193.)

27. The Court erred in refusing to permit the witness Marie Curtis to be cross-examined concerning the connection of herself and her husband with the Ku Klux Klan, her activities and interest in the political campaign in which the Defendant Agnew had been

renominated for sheriff and in which his opponent had been indorsed by the said Ku Klux Klan, and as to her having had a quarrel with Defendant Goodfriend in December, 1922, on the subject of the Ku Klux Klan. (Transcript, pp. 198, 199, 237, 202-203, 206, 231.) A part of the same matter had been gone into by the Government with another witness. (Transcript, pp. 54-59.)

28. The Court erred in denying a motion to strike out the testimony of Marie Curtis regarding alleged conversations between certain of the defendants prior to December 29, based on the grounds that her testimony showed that she was stating recollections of notes which she made some weeks after the conversations were claimed to have occurred, and not a present recollection of the conversations themselves. (Transcript, pp. 211-212.)

29. The Court erred in refusing to permit Marie Curtis to answer whether she had an independent recollection as to how long after the conversations testified to by her from her notes, she had prepared such notes. (Transcript, p. 216.)

30. The Court erred in permitting the witness Kuchenbacher to use and testify from his notes of conversations and happenings alleged to have occurred in Defendant Goodfriend's office, because of the witness' own statement that he could remember no conversations and could not testify except by reading his notes; that his original notes had been destroyed and that the ones used on the witness stand by him were written

up later than the original notes and enlarged upon when written; the notes so used never being offered in evidence by the Government. (Transcript, pp. 239-245, 252, 266.)

31. The Court erred in permitting the witnesses Curtis and Kuchenbacher to read from their notes as part of their testimony while on the witness stand. This assignment is based on those parts of the transcript already cited in connection with these two witnesses, Assignments 25, 28, 29, 30.

32. The Court erred in permitting the witness Kuchenbacher to testify to an alleged conversation between the defendants Goodfriend and Griffith concerning Defendant Hill and in connection with a place referred to as "Jap's place", and to further testify in regard to a certain policeman by the name of Briggs then on the police force, and to further testify concerning conversations relating to "stool pigeons", and to further testify to a conversation concerning Defendant Agnew being after a place known as the White House, all of which matters and things were not shown to have any material relation to the charge herein, and were prejudicial to the Plaintiff in Error Goodfriend. (Transcript, pp. 243-246.)

33. The Court erred in permitting the witness Kuchenbacher to testify about an alleged conversation between Defendant Goodfriend and a man unknown to the witness concerning Goodfriend's making some money and going to some world's fair, and concerning parties called Gill and George, and to where Defendant

Goodfriend thought Gill's "cache" was, and that Goodfriend could furnish protection to the White House in the matter of card playing, all of which matters are unrelated and immaterial and prejudicial to Plaintiff in Error Goodfriend. (Transcript, pp. 246-248.)

34. The Court erred in permitting the witness Kuchtenbacher to testify concerning deposits claimed to have been sent to a certain bank by Defendant Goodfriend through some man unknown to the witness, which matter was never connected with the case or shown to have any material relation to it. (Transcript, pp. 262-263.)

36. The Court erred in permitting the witness Paul Reynolds to testify from his notes, in view of his statement that his original notes taken at the time of the alleged conversations about which he testified were twice rewritten and enlarged upon and his original notes, being notes of all he heard of the conversations, having been destroyed, and he having made no claim that he had no present recollection of the matter, and having shown no necessity for referring to his notes while on he witness stand. (Transcript, pp. 283, 278-284.)

37. The Court erred in permitting the witness Paul Reynolds to read his notes from the witness stand. (Transcript, p. 286.)

38. The Court erred in sustaining an objection to the following question put to the witness Paul Reynolds:

Q. "And now, Mr. Reynolds, had you anything that you took to be information concernng any whisky at the

Vernon Hotel prior to hearing that conversation you have told about?" (Transcript, p. 288.)

The said question related to the witness' testimony concerning the conversation he claimed to have heard in Defendant Goodfriend's office between Goodfriend and another, and related to the matter already testified to by the same witness, concerning a search of the Vernon Hotel made pursuant to a search warrant. (Transcript, pp. 84-85, 285.)

39. The Court erred in refusing to permit the defense to inquire of the witness Paul Reynolds whether the search of the Vernon Hotel already testified to by him (see citations in Assignment 38) was brought about by the conversations he claimed to have overheard in Dr. Goodfriend's office. (Transcript, p. 288.)

40. The Court erred in refusing to permit the defense to inquire of the witness Paul Reynolds as to whether he had any other information upon which he relied in obtaining a search warrant for the Vernon Hotel other than he claimed to have gotten through conversations alleged to have been heard in Dr. Goodfriend's office. (Transcript, p. 289.)

42. The Court erred in denying the defense's motion to strike out the testimony of the witness Harry Briggs, who had been discharged from the police force, in view of the fact that it was not shown why he was discharged or by whom, nor was his discharge shown to have any connection with the case on trial; the matter being prejudicial to Plaintiff in Error Goodfriend. (Transcript, pp. 338-339.)

43. The Court erred in permitting the prosecution to inquire of Defendant Griffith concerning the acts and reputation of the Defendant Goodfriend, Plaintiff in Error, concerning his gambling and playing cards. (Transcript, p. 92.)

44. The Court erred in refusing to permit Witness Ernest Stoops to testify as to what, if any, orders had been given by Defendant Griffith as Chief of Police concerning the enforcement of the prohibitory liquor laws in Boise, and erred in refusing defendants an opportunity to make an offer of proof as to the propriety and competency of such evidence. (Transcript, pp. 391-393.)

45. The Court erred in sustaining the Government's objection to the defendants' offer of the original affidavit filed before Commissoner Jackson to procure the search warrant for the J. H. Evans place, pursuant to which certain distilling apparatus was seized and later offered in evidence in this cause, and at which time Defendant Kemp was arrested, said affidavit being marked for identification Exhibit 34, and showing on its face that the claims of the prosecution that the illicit distilling on the Evans place was discovered through overhearing conversations in Defendant Goodfriend's office were unfounded; and also rebutting the inference shown by the prosecution that the search warrant was procured and the search made because of what was heard in Defendant Goodfriend's office. (Transcript, pp. 396-401.)

47. The Court erred in instructing the jury concerning counts four, five and six of the indictment as follows:

> "I now come to an analysis of the indictment, and I will try to make that as brief as possible. You have been advised that the indictment contains six separate charges or counts. The first three counts are for conspiracy, that is, each one of the first three counts are for conspiracy, and each of the last three counts is for direct violation of what are commonly known as the revenue laws of the country, laws which have been upon the statute books a great many years, long before prohibition became even a state or a national policy. I will call your attention to those charges later on.
>
> * * * * * *
>
> "Now, in the fourth count the defendants are charged with having wilfully and knowingly, etc., had in their possession and custody a still, set up and ready for operation, without having first registered the same. Now that is based upon a statute, gentlemen, of some length, and I am not going to try to read it to you. It would be confusing to do so. It is based upon a statute which, as I have already intimated to you, has been upon the statute books for a long time. It was in existence when the country was still wet, as we put it. It provided safeguards in the enforcement of the revenue measures. The Government collected revenues from the liquor business, various branches

and features of it, and in one of the provisions of the law it is declared that one shall not have possession of a still set up—you will understand by that, not a still for sale, as a merchant would have it, but a still set up, ready for use. He should not set up any still or have it set up until he had registered in the manner provided by the law, with the collector of the district, with the public officer called the collector. That is the substance of the first charge. Then there is another provision in the same general law which provides that no one shall go into the business or engage in the business of distilling or being a distiller until he had first put up a bond to the Government, provided the bond prescribed by law. And that is the gist of the fifth count.

"And in the sixth count it is charged that the defendants engaged in the making and fermentation of mash or wort fit for distilling purposes, for distillation, in a place other than a distillery, and that is made an offense by the same general laws. It was to require that all liquor, that is fermented liquor, should be made in a distillery, a place well known, where government agents could go and measure it up and find out what the facts were, for the purpose of collecting revenue. So you have those charges contained in the last three counts. Number four, having a still set up without first registering with the collector; number five, engaging in the business of distilling without

a bond; and number six, making and fermenting mash fit for distillation purposes in a place other than a distillery. I have to say to you in respect to those three charges that upon his own statement you would be warranted in finding the defendant Kemp guilty, if you believe his statement. As I say, I am not directing you to find him guilty. It is for you to say from all of the evidence, but if you believed his evidence, and there was nothing else, that would be sufficient upon which to base a verdict of guilty. It is for you to say what the truth is. Before you can find the other defendants guilty upon these three counts, or any one of them, you must find that they knowingly participated in such violations of the law. It isn't necessary that they be present or actually or directly with their own hands take part in setting up or operating the still if, with knowledge of Kemp's purpose, they knowingly aided or abetted him in the unlawful enterprise of having a still set up, if you find that he was engaged in that, even though they worked at a distance, that is, the other defendants, remotely, they, too, would be chargeable with responsibility, that is, under the general principle that one who aids or abets another in a commission of a crime is himself equally guilty with the principal and is punishable as such."

* * * * * *

To the foregoing instructions the following exception was taken and allowed:

"Come now the defendants severally, and each for himself excepts to the instructions of the Court given to the effect that the defendants or any of them might be convicted on either of the last three counts of the indictment herein, for the reason that said counts are based upon the internal revenue laws, exclusively, and no proof has been submitted that the still in question was unregistered, that the distiller's bond in question in Count five was not furnished, or that the building in question in count six was not a registered distillery." (Transcript, pp. 447-450.)

48. The verdict of the jury is specified as unlawful: First, there is no proof that the building mentioned in Count six of the indictment was not duly authorized as a distillery;

Second, there is no proof that the distiller's bond mentioned in Count five of the indictment was not furnished;

Third, there is no proof that the still mentioned in Count four of the indictment was not lawfully registered;

Fourth, the evidence does not warrant finding that three different conspiracies existed as charged in Count one, two and three of the indictment. (Transcript, pp. 7-25, 49-50.) As to the failure of proof concerning Counts four, five and six of the indictment, the record speaks for itself and, of course, no particular citation to the transcript is possible.

49. The verdict is contrary to law for the reasons set out in Assignment 48 last above. And the judgment is unlawful for the reason that it is based upon a verdict which is unlawful and unsupported by the evidence in the particulars set out in the two foregoing assignments.

* * * * * * *

In the argument, each subdivision refers to one or more of the foregoing Specifications of Error, each being referred to by the number given it in the foregoing Specifications.

error relates also to the assignment concerning the Court's instructions, and the assignment concerning the Court's refusal to require an election between the two classes of charges contained in the indictment.

The record herein is necessarily so lengthy and the matters heretofore referred to in this statement so scattered through it that we have endeavored up to this point to give transcript citations which will apprise the Court of the nature of the case, the character of the evidence, and in a somewhat specific way, the nature of and the reasons for the assignments of error upon which the plaintiffs in error depend.

In the brief proper, immediately following, we have analyzed the record very closely and in our citations to the transcript have endeavored to bring together such separated portions of it as in each instance have material bearing on the points and assignments of error under discussion.

ARGUMENT

We have grouped the assignments of error according to their natural relation to each other. Each group will be treated separately, and for that purpose we have subdivided this portion of the brief into a number of different sections.

I

Assignments 2 and *3* are directed to the Court's refusal to sustain a motion for an election between the conspiracy counts in the indictment and those based on the Internal Revenue Laws, and to the

Court's refusal to permit a motion to quash the indictment. (Transcript, pp. 52-54, 7-25.)

It is well established that charges of the same class can be combined in the same indictment.

Pointer vs. U. S., 151 U. S. 396, 38 L. Ed. 208.

But the converse is true, that offenses of different kinds should not be joined.

The indictment in question charges three conspiracies to violate the National Prohibition Act. It also contains three charges alleging violation of the Internal Revenue Laws. When Congress re-enacted the penalties prescribed by the revenue laws, some of which laws had been repealed by the terms of the Prohibition Act, the Supreme Court held that this amounted a re-enactment of the revenue laws themselves.

U. S. vs. Yuginovich, 256 U. S. 450, 65 L. Ed. 1043.

U. S. vs. Stafoff, ... U. S. ....., 67 L. Ed. 211.

The National Prohibition Act makes the manufacture and sale of liquor illegal. On the other hand, the revenue laws deal with the manufacture and sale as an incident, legal, and the gist of each offense under the revenue laws is the failure to perform a condition precedent.

Failure to register a still, failure to furnish a bond coupled with intent to defraud the government of the tax on distilled spirits, and failure to establish the legal status of a building used for distilling, are respectively the last three charges of this indictment.

It hardly seems possible that one trial based on a single indictment should suffice to determine issues in part arising out of a law making a thing illegal, and in part out of other laws making the same thing legal. An indictment should hardly be a Janus-faced affair, looking in opposite directions at the same time. In order to establish its case under such a group of charges, the Government would seem to be obliged to prove that acts of precisely the same character are at one and the same time both lawful and unlawful. The whole evidence herein shows that the same overt acts are relied on as establishing the Government's case in both groups and kinds of charges.

We do not attempt to offer specific authority for the points, but we think the thing itself speaks for itself. Further, if it was unlawful for parties to combine together to make, or to sell, or to possess intoxicating liquors, it would hardly seem possible that the self-same making could have been legalized by the mere registration of the apparatus and of the building, or by furnishing a distiller's bond. If it could have been so legalized, then conversely, it was not a crime for the parties to join together for the mere purpose of making, or selling, or possessing such liquor. Such a charge would not be complete. The first three charges are *not* of conspiracies to violate the Internal Revenue Laws by refraining from doing the things required by the Internal Revenue Laws. We are aware that a conspiracy count may be joined with a count charging the commission of the offense contemplated by the conspiracy; but such is not the case here.

In the first three counts the position is taken by the prosecution that making liquor is in itself a crime under whatever circumstances it may occur. In the last three counts the position is taken that the possession of a still, which possession is illegal if judged by the same law upon which the first three counts rest, is legal provided it is properly registered with the collector of internal revenue; and that making liquor is legal provided the distillery is properly established, a bond furnished and the tax on distilled spirits paid. An offense, if any, would not be the distilling, but the failure to register, give bond, etc. To sustain these conflicting positions, the Government offered evidence touching upon one, and only one, act of manufacture. We submit that it was error to refuse to require an election between these sets of charges.

II

Assignments 48 and 49. The verdict herein is unlawful, for the reasons last assigned. (Trans., pp. 49-51.) Upon the same evidence the jury has dealt with both classes of charges precisely as though the gist of each arose out of the provisions of the Volstead Act. The legality or illegality of the acts charged as conspiracy depended on the Prohibition Act. But one cannot be convicted under both the Prohibition Act and the Revenue Laws for the same act.

U. S. vs. Stafoff, supra.

Further, there is nowhere in the record any evidence of a failure to register a still by plaintiffs in error, or

a failure to furnish a bond, or of a failure properly to establish and register a distillery as required by the Internal Revenue Laws. For this reason, we think the verdict in Counts 4, 5 and 6 of the indictment is not supported by the evidence and is unlawful; and it will be noted that the judgment (Trans., p. 51) is general; no doubt the Court in pronouncing sentence was influenced at least to a point of greater severity by the fact of a verdict of guilty on the last three counts as well as on the first three. This is a fair assumption. It seems inescapable that a Court sentences with greater or less severity in accordance with the jury's verdict on a number of different offenses tried together. And in all events a defendant is entitled to know for what he is being sentenced and to insist that he should not be sentenced upon charges unsupported by the evidence. Neither was there evidence to support a finding of guilty of three different conspiracies. There was, if any, one and only one.

III

Assignment No. 47. In the instructions to the jury (Trans., pp. 447-450), the Court instructed the jury that they might find the defendants guilty on the counts based on the Internal Revenue Laws. Exception was taken on the grounds that there was no evidence to support these counts. For the reason last stated we submit that there was error. There was no evidence of the failure or omission which constituted the gist of the charges in Counts 4, 5 and 6 of the indictment. (Trans., pp. 23-25.) Error in such instructions is al-

ways prejudicial. The jury must have understood that they could find a verdict of guilty under either or both of the differing classes of statutes on which the indictment rested.

We think that the judgment should be reversed because of this error.

IV

At this point we group together Assignments Nos. 10, 11, 12, 13, 14 and 15. These assignments all relate to the matter of the search of the private dwelling of Plaintiff in Error Carl Sorenson, the same having been a suite of rooms in the Vernon Hotel. During said search certain property was taken from the apartment. Edith Sorenson, his wife, afterwards one of the defendants in this case, concerning whom a mistrial resulted because of her illness, was arrested. Later she and her husband were informed against jointly in the United States District Court. Finally petition for the return of the property and to have the search declared illegal was made. The petition was verified by the oath of each and in support thereof was filed the affidavit of Plaintiff in Error Sorenson, and the affidavits of four other persons acquainted with the Vernon Hotel and the use of the rooms in question by the Sorensons as their private dwelling. Order to show cause was issued and served on the Prohibition Director for Idaho. He appeared in answer to such order by filing a demurrer to the petition and t the showing in support thereof. The matter was heard and taken under advisement on such demurrer and

thereafter the demurrer was sustained. Thereafter, when the two Sorensons were indicted in this case, it was stipulated that the record concerning the petition and the proceedings had thereon should be part of the record in this cause, which stipulation was approved by the Trial Judge (Transcript, pp. 27-49). As noted above, the hearing was had on the demurrer. None of the facts as set forth by the petition nor by the affidavits in support thereof were controverted. It was contended that the affidavits should not be considered because they were made before a Notary Public and not before a Federal officer qualified to administer oaths. The Court evidently did not take that contention seriously, since his opinion above referred to makes no mention of it. However, we think it is of small import whether the affidavits were properly verified or not. The demurrer admits the facts set forth in the petition and it cannot be denied that the petition was filed on behalf of the defendants by their attorney qualified to appear for them; that it set forth the search warrant and the affidavit upon which the search warrant was issued, and that all of the facts set forth were admitted by the Government. It cannot be seriously contended that the Government rested upon anything other than a pure question of law. The Court held distinctly that the facts contained were not sufficient to warrant a return of the property or a holding that the search was illegal. If the petition stated facts sufficient to show that the search was illegal, or if the affidavit upon which the search warrant was issued was insufficient, or if the warrant itself

was insufficient because of uncertainty or indefiniteness or otherwise, the property should have been returned and the search warrant held to be illegal, and the Government should have been denied the right to offer any evidence concerning what was taken in the search or what was learned in the course of conducting the search.

The affidavit upon which the search warrant was issued is shown by the exhibits attached to the petition and was also offered in evidence at the trial as Government's Exhibit 13 (Transcript, p. 81). It is entirely devoid of any statement of fact. The most that can be said for it is that the affiant had some information from some undisclosed source which he believed to be authentic. However, that part relating to the presence of liquor in the Vernon Hotel is pure hearsay. The law, Act of June 15, 1917, Title XI, 40 Stat. 228, providing the procedure necessary for the lawful issuance of a search warrant (see Sec. 25, Title II, National Prohibition Act) is very definite on this point.

Section 3:

> "A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."

Section 5:

> "The affidavits or depositions must set forth the facts tending to establish the grounds of application or probable cause for believing that they exist."

The term "probable cause" is well understood and plainly defined. It is of established meaning in the law, it occurs at other points in criminal procedure, and is too well understood to require much discussion. If a statement by the lone affiant who subscribed the affidavit in question here, that some unnamed person at some unspecified time told him so and so, is acceptable as evidence in a proceeding to procure a search warrant, the case forms an exception to all other situtions and is in a class by itself. Certainly the only "fact" that such an affidavit shows is the fact of the telling; it does not place anybody's oath behind the details told. Considered as evidence acceptable in judicial proceedings, and particularly in one conducted in the light of fundamental, constitutional guaranties, it has no standing. If a residence may be searched in spite of the constitutional guaranty and the statutes governing the issuing of search warrants, upon the strength of an affidavit containing hearsay, then there is no good reason why a man may not be put on trial in a criminal proceeding and convicted upon like hearsay testimony. Either procedure would be distinctly a violation of the Constitutional provision. The Fifth Amendment to the Constitution provides against searches and seizures except "upon probable cause supported by oath or affirmation * * *". Probable cause has been held universally and for many years to be established when *facts*, as that word is used in the law of evidence, have been shown upon the oath of a witness or witnesses sufficient to give rise to a reasonable belief in the existence of the thing or

matter in question. If this can be done by hearsay in a search warrant proceeding, the case occupies a position of splendid isolation.

The danger of permitting such proceedings upon hearsay affidavits is well illustrated in this case. The affidavit states that affiant's informant saw some whiskey in Room 207 of the Vernon Hotel. It appears beyond question that there never was any such room in that hotel. Nobody contended at the hearing on the petition or in the trial of this cause that there was any such room. Nobody contended that any such room was searched or that any effort was made to search such room. (Transcript, pp.71-86.) The rest of the hearsay statement is to the effect that the party who informed the affiant claimed to have seen liquor in some other room somewhere in teh hotel, its location undisclosed, and still undetermined, with no qualifying statement other than that the informant said that the room was at that time, which is undisclosed, occupied by Edith Sorenson. Whether the informant meant that at the time the room was occupied by her personal presence at the moment of seeing the liquor or at some other way or capacity, does not appear.

The second-hand information of the affidavit further relates that the same informant saw whiskey in other rooms of the hotel under the management and control of Edith Sorenson. Where these other rooms were, who they belonged to, whether to transient roomers, permanent guests, to Edith Sorenson personally, or to her husband and family, were left to speculation.

In short, it is entirely obvious that an effort was made to include in the affidavit a description so indefinite and at the same time so sweeping, that the officers might search wherever and whatever they pleased throughout the entire hotel. The only attempt at definite statement concerns Room 207, which was purely mythical. Certainly it cannot be said that this affidavit complies with that provision of the constitution requiring proof "particularly describing the place to be searched", as a condition precedent to the issuance of a search warrant. If the affiant in this matter, or the magistrate, thought that a search warrant could lawfully issue for the search of an entire hotel indiscriminately, it was certainly an easy matter so to state in the affidavit and the search warrant. If it were not intended to do that, then those portions of the hotel to be searched should have been "particularly described" in the affidavit and the warrant. It is no excuse to say that the information coming to the affiant was not sufficiently definite to permit of such a description. It would be bad enough to permit a search warrant to be issued on pure hearsay, but to say in addition that because of scarcity or indefiniteness of information the affidavit for search warrant need not contain the particular description required by the Constitution would certainly be outside all bounds.

A more serious defect appears in the latter part of the affidavit. It ceases to relate even the substance of the information claimed to have been received by affiant and goes on to state "that the affiant has reason to believe and does believe that intoxicating liquor

* * * is being unlawfully possessed, sold and used on the premises occupied by Edith Sorenson as a rooming house and hotel situated in the City of Boise * * * more fully described as follows: that certain premises known as the Vernon Rooms located at 1009½ Main Street, Boise, Idaho, and in particular the rooms thereof, which are directly under the management and control of the said Edith Sorenson and not subleased or let to any particular tenant."

The entire statement just quoted is purely a statement of affiant's belief. Affiant says he has reason to believe, but he discloses no reason. If it was intended that some reason should be inferred from the statement of his *information* which precedes the part of the affidavit now under discussion, still there appears no ground for his belief. His informant merely told him that he saw some liquor somewhere in the Vernon Hotel. He does not say that his informant told him that any was being sold in or about the place.

The petition filed states, and the demurrer admits, as also did the officers who testified at the trial of thi cause, that the only searching done in the hotel occurred in a private apartment occupied by Mr. and Mrs. Sorenson and their son and maintained solely and exclusively as their family home and residence.

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house. The term 'pri-

vate dwelling' shall be construed to include the room or rooms occupied and used not transiently, but solely as a residence in an apartment house, hotel or boarding house."

National Prohibition Act, Sec. 25, Title II.

"It shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as a dwelling and such liquor need not be reported provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling, and of his bona fide guests when entertained by him therein."

National Prohibition Act, Section 33, Title II.

The Fourth Amendment to the Constitution providing against searches and seizures excepting under warrant issued upon a showing of probable cause under oath and *particularly* describing the *place* to be searched and the *things* to be seized, must be liberally construed.

"It has been repeatedly decided that these amendments should receive a liberal construction so as to prevent encroachment upon or gradual depreciation of the rights secured by them, by imperceptible practice of Courts or by well-intentioned but mistakenly over-zealous executive officers.

"They are to be regarded as of the very essence of constitutional liberty.

"The guaranty of them is as important and as imperative as are the guaranties of other fundamental rights of the individual citizens—the right to trial by jury, to the writ of habeas corpus, and due process of law."

Gouled vs. U. S., 255 U. S. 304, 65 L. Ed. 650.

Certainly a statute providing the procedure for procuring and serving a search warrant must be construed just as liberally as the constitutional provision upon which it rests. In fact, the statute in question here exempting a private dwelling from search except a showing of fact be made that such dwelling is being used for the sale of intoxicating liquor or that it is used in part for some business purpose, and including in its terms the room or rooms occupied as a residence in a hotel, apartment or boarding house, does not permit of much construction. The language is plain and the exemption created by it is general and extends to all persons having established residences.

The Government saw fit to tender the issue under the petition in question, upon a demurrer; admitting the facts, as the demurrer did, it was contended that there were not sufficient facts to bring the case within the terms of the law just referred to. An examination of the petition (Transcript, 28-33) will disclose that a very full disclosure of the facts was made therein. The use to which the apartment which had been searched was then and theretofore put by the petitioners is set out in full. We are unable to understand just how one could state any more directly or concisely the fact that the apartment, consisting of a dining room, kitchen, living room and bed rooms, was the family residence of the petitioners and their son, that it had been put to no other use and that the specific facts which might authorize a search of such a residence did not exist in that case. The affidavits filed in support of the petition (Transcript, 38-45) set

out very fully the use of that apartment as the dwelling of the Sorenson family. In any event, the fact was before the Court that the rooms constituted an apartment used as a residence, and for no other purpose, and the fact was conceded by the Government. Surely it was not incumbent upon the petitioners, after the Government saw fit to raise an issue by demurrer, to undertake to raise an issue of fact at the hearing on the demurrer. If the facts stated in the petition had been controverted, a different situation would have existed, but since they were not, the petitioners were plainly right in relying upon the Government's admission that the rooms were used as a residence and for no other purpose. It was for the Government to choose the ground for the contest, and having chosen, it should stand thereon.

In his opinion, the Court surmises that there might be cases where the proprietor of a hotel, maintaining his residence in a private apartment within the hotel, might also use such residence for some other purposes. Surely it was not for the Court to inject speculation and possibility into a matter where the Government officers concerned were content to concede the facts as stated.

The apartment which had been searched was plainly protected both by the Constitution and statutes already cited from any such search, at least until the necessary showing had been made in order to procure a search warrant. Also it devolved upon the Government to disclose to the Commissioner who issued the warrant the *particular* place which was desired to be searched.

Further, if it is necessary to go further, the affidavit for the search warrant contains no statement of fact that any intoxicating liquor was being sold either in the residence in question or in the hotel. It does not even say that the residence apartment which was searched was used for any business purpose. The fact is, that a hotel or apartment house is used for business purposes to some extent, at least, by the proprietor thereof, and may contain within it one or more residences. A blanket search warrant for a hotel or apartment house will not permit the search of a private residence located therein.

U. S. vs. Mitchell, 274 Fed. 128.

A statement in an affidavit that affiant has reason to believe and does believe this or that is not a statement of fact at all. The phrase "has reason to believe and does believe" is not a statement of fact, and a search warrant cannot lawfully be issued upon the strength of such a statement.

U. S. vs Rykowski, 267 Fed. 866.

> "The oath in writing should state the facts from which the officer issuing the warrant may determine the existence of probable cause or there should be a hearing by him with that purpose in view. The immunity guaranteed by the constitution should not be lightly set aside by a mere general declaration of a non-judicial officer that he has reason to believe and does believe, etc."
>
> "The undisclosed reason may fall far short of probable cause."

Ripper vs. U. S., 178 Fed. 24 (C. C. A.).

See also U. S. vs. Ray and Scholtz, 275 Fed. 1004.

"All he swears to is that he has good reason to believe and does verily believe so and so. He does not swear that so and so are true.

"He does not say why he believes; he gives no facts or circumstances to which the judge could apply the legal standard and decide whether there was probable cause for affiant's belief. There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts and under our system of Government the accuser is not permitted to be also the judge."

Veeder vs. U. S., 252 Fed. 414 (C. C. A., 7th Cir.)

In the last case, certiorari was refused.

264 U. S. 75.

As pointed out in some of the cases cited, the law controling the issuance of a search warrant is no different now than it was before the search warrant statute and National Prohibition Act were passed. The statute was merely declaratory of the practice formerly established and followed.

Nor does it make any difference what may be found in the course of an illegal search.

"An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying on the chance of discovery that the constitutional amendment was intended to protect the people."

U. S. vs. Slusser, 270 Fed. 818.

It will be observed that the affidavit and search warrant relate exclusively to some unidentified rooms and a certain hotel under the control of Edith Sorenson. But under the issue submitted to the Court, it was undisputed that Carl Sorenson maintained the premises which were actually searched, as the head of the family which lived there. It was also undisputed that the property taken belonged to him. It is quite obvious that the residence apartment was not under the management or control of the wife. The husband had the same right as any other husband to establish, manage and control the family residence. His right to do so and the fact of his having done so in this case would be recognized in the law of domestic relations, or in any other branch of the law. It was the home that was searched and the husband's property that was seized, under a showing and on a warrant directed against premises "managed" and "controlled" by Edith Sorenson, his wife. There was no vestige of a showing that the family residence was to be searched nor that any property mentioned in the affidavit and warrant was being used for the sale of liquor, nor was there any showing that liquor was sold in this apartment at any time, or that any business was carried on there. In this case there existed premises, the most of which was devoted to use as a hotel, having a lobby, a registration desk and rooms for rental to guests; but from which hotel a group of rooms was set apart and excluded for use as a private dwelling. Even a mere roomer in the hotel occupying his room or apartment as his residence, he not being a mere transient guest,

would be entitled to the immunity from search provided by law. Surely the proprietor of a hotel who maintains his private apartment for residential purposes on the premises has at least equal rights with such a guest, be the hotel large or small.

The Court not only sustained the demurrer on the strength of his own surmises and speculation as to possibilities, but later permitted the Government officers who made the search and seizure to testify in full concerning the matter and as to what they learned in the course of the search.

> "Nor can any knowledge obtained in the course of an unlawful search and seizure be used in any proceeding against the party whose rights have been so violated. The Constitution covers the substance of the matter as well as its form. The Fourth Amendment is not merely 'a form of words'.
>
> Silverthorne Lbr. Co. vs. U. S., 251 U. S. 385, 64 L. Ed. 319.

In brief, the affidavit for the search warrant first states hearsay of the most indefinite character as to time and particulars generally, disclosing no facts that are supported by the oath of the affiant or anyone else. It then states that the affiant *believes* certain things. Its entire substance is, therefore, condemned by the statute and by the decisions of our Courts. The warrant itself is equally indefinite, founded on hearsay and belief, and is of such a nature that the officers might search where they pleased. Neither document gives any *particular* description of the place to be searched or the things to be seized. It was, therefore, insuffi-

cient; the whole proceeding was illegal. The property should have been returned to the petitioners, and the search declared illegal. The Court himself even sought to place the petitioners under oath and to examine them himself during the course of the trial on the case which is now before this Court (Transcript, pp. 74-77). Certainly this procedure was unwarranted. As before stated, the Government raised no issue of the fact when the petition concerning the search and seizure was filed. It was not up to the defendants to gratuitously tender any evidence or further proof if the Government was satisfied to accept the facts as stated by the petition or supporting affidavits, or either. The proposed examination by the Court himself could certainly have been nothing more than a sort of exploratory expedition conducted in support of the Government's contentions, and was proposed in violation of their constitutional rights as defendants.

Some of the witnesses testified that there was a buzzer in one of the rooms of the apartment house which sounded when the entrance door of the hotel was opened. They "supposed" that that was for the purpose of calling the person in charge into the lobby to meet the coming guest. We believe it was entirely unwarranted and unlawful to permit these witnesses to testify at all, but even so, surely the presence of a buzzer in the house of a storekeeper located close to his place of business which would apprise him in his absence from the store that a customer had entered the place of business would not strip his residence of its character as a dwelling place. If so, then the tele-

phone in the house of an attorney at law by which he is frequently called to his office by a client would seem to constitute his residence a part of his law office.

Nowhere in the evidence offered by the Government in this case concerning the Vernon Hotel is there any suggestion that any business whatever was ever transacted in the private apartment of the proprietor or that any liquor ever was sold there. Up to the date of this writing there has been no shadow of proof of the existence of either one of the two conditions, one of which at least must exist before a search warrant can lawfully issue against such a residence. If we were to assume, therefore, that the affidavit and warrant in this case had been specially directed against the apartment in question, still there was no showing to justify such a warrant and there has not been any showing, either then or at the trial of this cause, that any facts existing which would have justified such a warrant if they had been properly shown by affidavit as required by law. We submit that the search and seizure was illegal and that the subsequent admission in evidence of the property seized and the subsequent testimony given by the officers who made the search, constitute prejudicial error. And we submit that this error extends not only to the case of Carl Sorenson, one of these plaintiffs in error. The other plaintiffs in error indicted with him for conpsiracy must necessarily have been prejudiced by anything so vital as the error which occurred here. It is impossible to say how far such prejudice would operate against any or

all of these plaintiffs in error, but it is absolutely certain that it must have operated seriously to their detriment. We submit that this point alone is enough to require a reversal of the judgment in this cause. It will be noted that the indictment itself, in each of the first three counts (Transcript, pp. 7-23) sets out as against each and every of the defendants the presence of intoxicating liquor in the Vernon Hotel as one of the overt acts in furtherance of the object of the conspiracy. The proof of that overt act is the evidence just discussed, obtained by unlawful search and seizure. We submit that the judgment should be reversed.

See also:

Central Consumers Co. vs. James, 278 Fed. 249.
Citing many authorities.
U. S. vs. Armstrong, 275 Fed. 506.
Giles vs. U. S. (C. C. A., 1st Cir.), 284 Fed. 208.

V

Assignments Nos. 24, 26, 32, 33, 34 and 42. In all of the assignments mentioned, reference is had to testimony of conversations admitted over defendant's objection, in which it was claimed a variety of different matters were discussed, none of which had any relation to the charges against the defendants nor were they in any way connected by other evidence to show their materiality. One of these concerned an alleged conversation between Dr. Goodfriend and Chief of Police Griffith, concerning Ed Hill, a detective, relating to some place known as "Jap's Place", not shown

to have anything to do with the case on trial. Apparrently the only purpose served by the conversation was to bring into the case the mention of gambling in connection with Plaintiff in Error Goodfriend. In a most prejudicial manner, the same subject was gone into later, as pointed out in a later assignment. Such repetition is strongly indicative of design rather than accident. (Transcript, pp. 138-141, 243-246, 384-386.)

Another instance relates to a supposed conversation between Dr. Goodfriend and a man unknown to the witness, concerning interference with the Doctor's telephone line (Transcript, p. 193). What possible relation this could have, except as a mysterious suggestion that the Government might, if it chose, prove a great deal more against the Doctor, is hard to understand.

Another instance is the testimony of Witness Kuchenbacher that the Doctor told somebody he expected to clean up some money and talked about going to some world's fair. The party to whom he was talking was unknown to the witness. (Transcript, p. 246.)

Another instance relates to the Doctor's alleged conversation with unknown parties concerning someone by the name of Gill and another called George. Again the witness persisted in referring to the subject of card playing. (Transcript, pp. 247-248.) A little later the Government offered evidence that the Doctor asked one of his patients to deposit $110 at the bank; and that on a later date the Doctor asked him to make a deposit of either $140 or $150. When objected to, the District Attorney stated that the Government

could show a lot of other deposits and prove the making of them by the bank's records. The evidence offered was objected to, which objection was overruled. (Transcript, pp. 262-263.) The offer to show other deposits never materialized, and no connection was ever shown.

In another instance (Transcript, 338) a discharged policeman was called to testify that he had been discharged. A motion was made to strike out his testimony as immaterial, which was denied (Transcript, p. 339.) It was not shown who discharged him or why he was discharged.

These matters may be, and no doubt are, comparatively unimportant as compared with the more outstanding features of the case; but a continuous succession of error, as we believe these matters to be because of their lack of connection, will eventually overload any defendant in any criminal case. Error is presumed to be prejudicial until the contrary appears beyond doubt.

Crawford v. U. S., 212 U. S. 183, 53 L. ed. 465.
Ayer v. N. Mex. 201 Fed. 497.
Pettine v. N. Mex. 201 Fed. 489.
Sprinke v. U. S. 150 Fed. 56, 51 L. ed. 922.
Todd. v. U. S. 221 Fed. 205.

Certainly the persistent attempt to characterize Dr. Goodfriend as a gambler was prejudicial. He was not being tried for gambling, nor was his defense attempted to be supported by evidence of good reputation, nor were the references to gambling shown to have the faintest

semblance of relation to the charges against him. We submit that the errors multiplied to a point where it must necessarily have prevented Dr. Goodfriend from having a fair trial.

Boyd v. U. S. 142 U. S. 450, 35 L. ed. 1077.

VI

Assignment No. 44. As to Defendant Griffith and his alleged connection with the conspiracies, the defense attempted to show that he had not tried to interfere with law enforcement by his patrolmen. It must be obvious that this was an important matter to the defense as well as to the prosecution. It was the Government's theory, and proof was attempted, that the Chief of Police and Captain of Detectives, together with the Sheriff's office were brought into a conspiracy to afford "protection" (Transcript, pp. 321-322). The Chief's attitude toward enforcing laws, and particularly toward the hotels and rooming houses in which it was claimed the illicit liquor was to be handled, became a very important consideration. When it was attempted to be shown that he had not influenced the police force to disregard lawlessness of the sort in question, the Government's objection was sustained (Transcript, pp. 391-393). It was finally agreed that the Chief had given no orders concerning rooming houses, but the Court's ruling as to his instructions on the subject of the liquor laws was allowed to stand and the record in that regard was left unchanged. We submit that the attitude of the Chief and his instructions in regard to the liquor laws should have been

gone into fully, and to refuse an offer of such testimony was erroneous.

VII

Assignment No. 16. In regard to the Vernon Hotel, supposed to be an outlet for illicit liquor, in charge of the plaintiff in error Sorenson and his wife, who became ill at the outset of the trial, the Government was permitted to put in evidence the fact that an abatement action was commenced against the Vernon Hotel some two or three weeks after the search of that place already referred to (Transcript, p. 92). We think that this was prejudicial, since it was on a par with proof of a different offense for the purpose of convicting of the offense for which Sorenson was being tried. This is probably one of the small matters which we have mentioned before, but nevertheless it added so much more to the defendants' handicap.

VIII

Assignment No. 43. This assignment relates to a direct inquiry made following several statements by witnesses concerning gambling as related to Dr. Goodfriend, in which the District Attorney, over the Doctor's objection, went into the question of his reputation for gambling and in his question dubbed him a professional gambler (Transcript, p. 92). We have already alluded to this matter in connection with earler references to gambling as being apparently the culmination of a series of such references designed to prejudice the jury against Dr. Goodfriend.

IX

Assignment No. 17. The Government was allowed to put in evidence two newspapers bearing dates of March 16 and March 23, 1922, as found in the house on J. H. Evans' place, where a still was seized together with some liquor, and the defendant Kemp arrested, on January 15, 1923, nearly a year later. (Transcript, pp. 95-98.) Obviously, a newspaper current in March, 1922, and at that time addressed to the defendant, should not be accepted as evidence connecting him with a place claimed to be the scene of a crime nearly a year later. Unless further connection was shown, it would certainly be unfair to such defendant to submit them as showing that he had something to do with the crime committed on premises which had never been occupied by him at any time and which crime was committed a long time after the date of such newspapers. In fact, the Government did not even attempt to show that Dr. Goodfriend ever received the papers in question. They were found at a place, an acreage tract adjoining a similar tract on which he lived, and for aught that appeared might have been delivered there originally by mistake, or might have found their way there in any number of ways entirely disconnected from his activities. We think unquestionably the admission of such papers into the case was error and it is undeniable that nothing whatever was shown thereafter to connect them with the case.

X

Assignments Nos. 5, 6, 7, 8 and 9. In the opening of the case, the Government was allowed, over objec-

tion, to go at great length into the alleged sale of a bottle of liquor by a woman named Etta Goldsbury. It was evidently the Government's theory that the Defendant Ed Ward controlled the Union Rooming House, and used it as a place for the disposal of liquor said to have been manufactured by the defendants. However, the Government's evidence (Transcript, p. 59) showed that he had nothing to do with the rooming house except that he had a room there. The Government proceeded, however, to put on the witness stand a number of witnesses who testified concerning Etta Goldsbury and her arrest (Transcript, pp. 59-71). One of these said that he bought some liquor from her in the Union Rooming House; another said he was present when it happened; one said that the Defendant Ed Ward was there in the rooming house, but he didn't think anyone saw the transaction of the purchase but himself and Mrs. Goldsbury. This is the only mention of the Defendant Ed Ward in that connection. Then the former Prosecuting Attorney of Ada County was called to testify as to a conversation he had with the two preceding witnesses when they were in jail. In what fashion this was connected with the charges against the defendants we are unable to gather. It was not claimed that Ed Ward sold any whisky, and the Government witness said he did not think that anyone saw the transaction. It is not claimed by any witness that Ed Ward knew anything about the transaction. We submit that the objection to this testimony should have been sustained, and that the reception of the testimony was error, particu-

larly as to the defendant Ed Ward and to a less degree but substantially so, as to his co-defendants indicted for conspiracy with him.

XI

Assignment No. 27. This assignment deals with the refusal of the Court to permit the witness Marie Curtis to be cross-examined concerning the relations of her husband and herself with the organization known as the Ku Klux Klan.

The witness testified (Transcript, pp. 178, 199) that she had talked to Dr. Goodfriend in his office on several occasions. She was asked (Transcript, p. 237) about a particular conversation and as to whether she did not have a quarrel with Dr. Goodfriend on the subject of the Ku Klux Klan. The Court sustained the objection and an exception was taken. It would seem that in view of her other testimony, Goodfriend had an assured right to inquire further concerning the conversations which she said she had had with him. He also had a right to show this incident as creating upon her part a motive which might very possibly result in coloring her testimony against him. It is not impossible that it might even have been the cause which accounted for the notebook which she had so assiduously prepared in order to testify against him and some of his associates in this trial. We are aware that matters such as this stand largely each upon its own merits, but we submit that it was error to deny Plaintiff in Error Goodfriend the right to inquire further into the matter which the witness herself had suggested,

more particularly since the matter inquired about bore with special significance upon an antagonistic relation which, if the matter in the question were admitted by her, arose just about the time that she claimed to have commenced preparing her statement for use against him.

The Court likewise refused the defense the right to inquire into the activities of herself and her husband at various points in Idaho and Oregon in connection with a Mr. Burger, a lecturer for the Klan. (Transcript, pp. 202-203.) The Court likewise refused to permit her to be examined concerning her interest in one Jackson, who had been the opponent of Plaintiff in Error Agnew for nomination for Sheriff in the primary election during the preceding summer. (Transcript, p. 206.) This matter of the primary had been gone into over the defense's objection, very fully, by the first witness called by the Government. (Transcript, pp. 54-59.) It was one of the matters which the Government relied upon as showing the origin of the alleged conspiracy between Dr. Goodfriend and Sheriff Agnew and his deputy, Plaintiff in Error Kinney. If Goodfriend's activities in that campaign, and in connection with the Sheriff thereafter during the following election, were important, it was certainly of equal importance to go into the question of the interest of the chief witness against him in the same, and its source. It was very possible that enmity toward Dr. Goodfriend and Agnew on the part of this woman had its origin in the fact of her and her husband's association with the Ku Klux Klan organization and its sup-

port of the defeated candidate. It is matter of common knowledge that such political feuds sometimes result in the taking of extreme measures of retaliation. We think the defense had the right to inquire, at least, as to the affiliation of this witness and her husband, and as to the effect, if any, such affiliation had on the witness's attitude toward Dr. Goodfriend and Sheriff Agnew. Again the matter must be judged largely on its own merits; but we believe that the defense's right of cross-examination was erroneously restricted, and the rights of Plaintiffs in error in that respect invaded by the Court's ruling. It is elementary that such a course of inquiry must have a beginning and no one question can indicate to the Court the full purport of such examination. Certainly the defense should have been permitted to lay the foundation, in a preliminary way, by inquiring into this woman's affiliation and her husband's feeling toward some of the plaintiffs in error. An offer of proof was made and refused. Whenever the subject was mentioned, an objection was immediately sustained without any inquiry as to the purpose or the scope or direction to be taken by the proposed line of questions. (Transcript, p. 231.)

These matters are of serious import, and taken together with a similar course of ruling by the Court, it seems to us quite obvious that the defendants were deprived of a fair and reasonable opportunity to pre sent their defense and to disclose the motives which led to the voluntary effort on the part of this woman to create against plaintiffs in error a case upon which they could be indicted and convicted. Prejudice therefrom, as before shown, is presumed.

XII

Assignments 38, 39 and 40. These assignments refer to the Court's refusal to permit plaintiffs in error to inquire of the witness Paul Reynolds as to whether the search of the Vernon Hotel, already discussed in this brief, was brought about on account of information obtained through the espionage conducted at Dr. Goodfriend's office, or by other means. (Transcript, pp. 287, 289.) The witness Paul Reynolds had testified (Transcript, pp. 284-285) that he heard some conversation between Dr. Goodfriend and Mrs. Sorenson originally a defendant in the case, in which whiskey was mentioned and mention was made of Room 207 in that connection. The witness Paul Reynolds also testified theretofore (Transcript, pp. 84-86) to having participated in a search of these premises. Other witnesses had also testified on the same matter. It was an essential part of the Government's theory of the case, and of its contention to the jury throughout, that the Vernon Hotel was the principal source of outlet for the illicit liquor claimed to have been contemplated by the conspiracies charged against the defendants. From the Government's standpoint, and as its case was presented through the evidence, the inference arose, which the jury would be admonished by the Government attorneys to draw, that the Vernon Hotel as such a medium of distribution was discovered through the conversations overheard at Goodfriend's office. At no time throughout the testimony was any other explanation given. Therefore, it was a fair question on cross-examination of this witness, who had himself pro-

cured the search warrant, whether or not the information which he claimed to have gotten at the Doctor's office led to that search, or whether such search was caused by facts learned otherwise. If the latter, the inference above mentioned would have been precluded, because the ground for drawing it would have been destroyed. The witness stated that he made an affidavit to secure the search warrant, stating there in his information; he was asked whether he relied upon any other information than that in the search warrant. This he was not permitted to answer. We assign this as error affecting one of the vital features of this case, that is, the Government's theory of the connection of the Vernon Hotel with the conspiracies and illicit operations charged against these plaintiffs in error.

XIII

Assignments Nos. 18 and 45. The witness Paul Reynolds testified to searching the ranch of J. H. Evans and to finding a still, some liquor and other properties, and arresting Ed Kemp, originally one of the defendants herein; after testifying fully as to this (Transcript, pp. 95-98) on cross-examination he was asked (Transcript, pp. 99-100) concerning the affidavit which he himself had made to procure a search warrant for the Evans ranch. A certified copy of the search warrant was shown him and he identified it as the copy which he served upon the occasion of that search. He was asked whether his statements in the affidavit as to the information which led him to procure the search warrant were correct. The Court stated that unless he

remembered, he could not properly answer. However, there was no claim made by the witness that he did not remember, the lack of memory being merely a surmise by the Court. We submit that it should have been left to the witness to answer it if he could. No one else was competent to state, and much less was the Court competent to surmise, that he did not remember.

Later (Transcript, pp. 396-401), the United States Commissioner who issued the Evans search warrant was called to the stand by the defense, the original record of the affidavit, the search warrant and the return attached thereto shown to him as Exhibit 34, and he was asked to and did identify them. The affidavit was offered in evidence, and the Court's attention called to the fact that the defense had attempted to examine Paul Reynolds, the maker of the affidavit, earlier in the trial; and counsel explained that the offer was of an original record of a judicial proceeding and was the best evidence to show upon what grounds the Evans search warrant was issued. The affidavit (Transcript, p. 397) stated that Paul Reynolds had been informed by reliable parties who had stated to him that they had seen several automobiles going to the Evans house at various times of the day and night with the lights on the automobiles extinguished before approaching said house, and that the informant had seen a dim light in one of the rooms of the said house, and had detected an odor of mash and whiskey on the place; and that said parties had informed the affiant that they had seen barrels and other equipment

such as is used for the manufacture of intoxicating liquor hau led to the premises.

The offer, however, was rejected. The Court was apparently of the opinion that the judicial record offered could serve no purpose except to impeach the witness Paul Reynolds. His ruling was very definitely that the evidence was not admissible as the best evidence of what caused the Evans search.

We submit that the original record is the best evidence of what occurred in that judicial proceeding. And since it was very patent that the Government was contending, and did contend, as in the search of the Vernon Hotel, that the Evans place was searched as a part of the development of the case against these plaintiffs in error, brought about by the conversations claimed to have been overheard at the Doctor's office; the inquiry became very pertinent as to whether the still on the Evans place was connected with the alleged conspiracy by means of information so obtained, or by other means.

We believe that it is beyond argument that the judicial record made before the Commissioner and by him returned to the Court under which he held his authority, and which related to one of the fundamental aspects of this case, was the best evidence of what led to the Evans search. We think it is equally well assured that not even the maker of the affidavit would be allowed to impeach that record, which he himself had caused to be made. Neither he nor anyone else had claimed that such information as was related in that record, the affidavit for the search warrant, had

been obtained at the doors of Dr. Goodfriend's office not from any conversation of any defendant or in any other manner connected with the defendants. In substance the information which he related in that affidavit would have been a distinct addition to the evidence in this case, as showing very plainly that the connection of the still on the Evans place with these defendants never occurred to anyone concerned in making the case against them until after the raid of the Evans place on January 15, 1923. Under the Court's rulings, the defense was not permitted to offer this record, nor was it permitted to inquire of the maker of the affidavit whether he had other information not stated in the affidavit which figured in bringing about the search of the Evans place.

That the record of the judicial proceeding concerned was the best evidence as to what caused the search warrant to be issued, see the following authorities:

Baskin vs. U. S., 209 Fed. 740.
22 C. J. 799, Sec. 910.
Elliott, Evidence, Secs. 570, 618, 212.
Wigmore, Evidence, Sec. 1335.
Selph vs. Selph (Ga.), 65 S. E. 881.
Coombs vs. Cook (Okla.), 129 Pac. 698.
Coal Corporation vs. Steinman, 223 Fed. 743.
Ray vs. Law, Fed. Cas. No. 11, 592.

We submit this as further error, an error which was prejudicial. The plaintiffs in error were charged with violations of the Internal Revenue Laws on the subject of distilling, and several of the overt acts set forth in the conspiracy counts against them specifically re-

lated to the property found and seized upon the Evans place. The only evidence touching the question of distilling, or of setting up a still or manufacturing liquor in any way, was the evidence of the seizure of this apparatus. The Government sought to establish at least by inference from the testimony of Curtis and Kuchenbacher, that this still was set up and operated by the plaintiffs in error, and that its presence was discovered and later uncovered by listening to conversations at Dr. Goodfriend's office. The affidavit plainly showed that such was not the fact, but that the search and seizure and the arrest of the defendant Ed Kemp were brought about by information entirely different than anyone claimed to have received through the door of the Curtis rooms.

Crawford vs. U. S., 183, 53 L. Ed. 465.

We believe there is no question that the Court's rulings complained of in the assignments of error here involved were erroneous and prejudicial to the rights of plaintiffs in error.

XIV

Assignments Nos. 25, 28, 29, 30, 31, 36, 37 and 41. In the foregoing sections of this brief a number of matters have been discussed under Assignments of Error which we believe to have operated to the prejudice of the plaintiffs in error. In a number of instances, we have candidly said that we do not contend that any *one* alone of the minor features of the case, assigned as error, would be sufficient to justify a re-

versal of the judgment, but we submit that a succession of errors, even in minor matters, constitutes in the aggregate a burden which a defendant should not be called upon to bear. In the assignments already discussed there are several outstanding features which, as we have there indicated, we believe to be ground for reversal, each in itself alone. There are a number of others which we believe to have had a cumulative effect which could not but have prejudiced the defendants very seriously in the eyes of the jury.

17 C. J. 368, Sec. 3751.
People vs. Harris (N. Y.), 102 N. E. 546.
People vs. Becker (N. Y.), 104 N. E. 396.
State vs. Shafer (Mont.), 55 Pac. 526.
State vs. Dolliver (Minn.), 184 N. W. 848.

We come now to one of the outstanding features of the case, which deals with the very substance and essence of the evidence which constituted the heart of the Government's case. We refer to the testimony of Marie Curtis, Oscar Kuchenbacher and Paul Reynolds (Transcript, pp. 128-238, 238-277, 277-291.)

1. The witness, Marie Curtis, testified that she, not as an officer, but as a volunteer and without any compensation or promise of reward from any source, conducted a system of continuous espionage upon the occurrences in the office of Dr. Goodfriend by looking and listening at a door connecting one of the rooms in which she lived with Dr. Goodfriend's private professional office. She stated that the first conversation she listened to occurred in December, 1922, and that

about December 29 she commenced taking notes of what she saw and heard, under the direction of the Assistant District Attorney. She professed to testify from her unaided present recollection concerning certain conversations, the presence of certain parties in the Doctor's office, and other details, at two or three times in December. Beginning with December 29th and from then on throughout January and February, up to the date of the indictment herein, she professed to have continued her operations and on each occasion after listening to the conversations or observing transactions in his office, while her recollection of the matter was still fresh and accurate, to have written in notebooks, of which she produced a series, a record of what she saw and heard. Repeatedly she was examined as to how, when and under what circumstances she made these notes. (Transcript, pp. 128-238; as to examination concerning her notes, see pp. 133-138, 203, 211, 216.)

Repeatedly her testimony was objected to upon the ground that she was not testifying to any recollection of her own, but was merely reading from her notebook a narrative statement which she herself had written; that the notes were incompetent, and not properly verified and guaranteed. (Transcript, pp. 137, 153-154, 157-161.)

At the outset of her testimony she was directed by the prosecutor to refresh her memory from her notes and after having done so to state what she saw and heard (Transcript, p. 138). However, later during her direct testimony it was conceded by the Court that

she was not testifying from any present recollection, but was reading, or substantially so, the statements which she had written in the group of notebooks from which she was testifying. (Transcript, pp. 157-161, 185, 192, 193.)

The Court ruled that this procedure was permissible, although holding that the notebooks themselves would not be admissible. (Transcript, p. 137.)

Before the end of her testimony, the prosecutor himself directed her to "read from her notes". (Transcript, pp. 178, 182.)

In her cross-examination she stated repeatedly that she had no present recollection of the matters about which she had testified; that while she might be able to state a very little here and there, she could not testify concerning the matters and things which she had professed to state in her direct examination, except as those things appeared in the record which she had prepared in her notebooks. (Transcript, pp. 204, 205, 206, 207, 208, 209, 210, 211, 213, 214, 215, 216, 217, 219, 220, 222, 223, 224, 226, 227, 228, 230, 233, 235, 236.)

Motion was made eventually to strike her testimony concerning the first conversations she claimed to have heard, on the ground that it was incompetent and that she was devoid of any recollection concerning the matters according to her own statements and that it had then developed that she was telling what she remembered about some of her notes which she had written at a former time, but had not produced, and that such matter was not competent evidence. This motion was denied. (Transcript, pp. 211-212.)

To all of the adverse rulings as above referred to as shown, exceptions were taken and allowed. All exceptions inure to the benefit of all defendants (Transcript, p. 55).

The witness also testified (Transcript, pp. 135-137, 210) that in writing her notes she had not set down in them the full conversation and details which she had heard and observed, but selected therefrom such data and such portions of the conversation as in her opinion pertained to this charge against these plaintiffs in error, which was to say, obviously, that she claimed to have set down in her notebooks such details as she thought would serve as evidence against plaintiffs in error and perhaps convict them of the proposed charge against them. She admitted that it was her purpose to gather evidence against them and that she was instructed to do so. (Transcript, pp. 133, 217-218.)

We submit that there is no rule or law of evidence concerning the use of memoranda by a witness or its use as evidence in Court which will uphold the procedure had in this case or which will support the rulings of the Court in the course of this trial. In the first place there is at least a very grave doubt whether memoranda such as this can be used in our Federal Courts for any purpose other than to refresh the recollection of the witness. While our Supreme Court has never positively established such a rule, it has refused to commit itself to any other, and has on several occasions discussed the question here involved. It has recognized that among our State Courts there is a divergence of opinion as to how and in what manner

such memoranda may be used, and in stating that divergence of opinion it has correctly stated the two rules recognized in the State Courts and by the text-book writers, neither one of which justify the procedure which was had in this case.

In *Vicksburg Railraod Company vs. O'Brien*, 119 U. S. 99, 30 L. Ed. 299, which was a case for damages on account of personal injury, the plaintiff had been permitted to read to the jury a statement of the injury and condition of plaintiff and a prognosis of the patient's case written some time before, shortly after the injury, by the physician in charge. In discussing the matter the Supreme Court said:

> "We are of the opinion that this ruling cannot be sustained, upon any principle recognized in the law of evidence. The authorities are uniform in holding that a witness is at liberty to examine a memorandum prepared by him under the circumstances in which this one was, for the purpose of refreshing or assisting his recollection as to the facts stated in it.
>
> "But there are adjudged cases which declare that, unless prepared in the discharge of some public duty or of some duty arising out of the business relations of the witness with others or in the regular course of his own business, or with the knowledge and concurrence of the party to be charged, and for the purpose of charging him, such a memorandum cannot, under any circumstances, be admitted as an instrument of evidence. There are, however, other cases, to the effect that where the witness states, under oath, that the memoranda was made by him presently after the transaction

to which it relates for the purpose of perpetuating his recollection of the facts, and that he knows it was correct when prepared, although after reading it he cannot recall the circumstances so as to state them alone from memory, the paper will be received as the best evidence of which the case admits.

"The present case does not require of us an examination of numerous authorities upon this general subject; for it does not appear here but that at the time the witness testified he had, without even looking at his written statement, a clear, distinct recollection of every essential fact stated in it. If he had such present recollection there was no necessity whatever for reading that paper to the jury. Applying, then, to the case the most liberal rule announced in any of the authorities, the ruling by which the plaintiffs were allowed to read the physician's written statement to the jury as evidence, in itself, of the facts therein recited, was erroneous."

On a later occasion the Supreme Court referred again to the same matter. A list of certain securities owned by a witness from time to time had been offered in evidence. On cross-examination the witness testified she did not remember just when the various items were put down, could not recall what some of the figures referred to, that some of the entries were not reliable, that she did not remember the circumstances under which they were made. The memorandum was not used for the purpose of refreshing the witness' memory, but was admitted as evidence before the jury to show the character and value of the securities there listed.

After discussing the question and referring to certain earlier decisions of the Supreme Court having some slight bearing on the question, the Court discussed *Vicksburg Etc. Co. vs. O'Brien, supra.* The Court then said:

> "We do not regard any of these cases as committing this Court to the general doctrine that such memoranda are admissible for any other purpose than to refresh the memory of the witness."

In a case decided in recent years by the Circuit Court of Appeals of the Eighth Circuit these facts were considered: A revenue collector had been sued for recovery of money paid under protest, and at the trial a revenue agent was permitted to read from a diary conversations, including questions and answers, which he claimed to have had with the plaintiff. Objections were made and overruled. The Revenue agent did not state whether he had any recollection of these matters or not, neither did he claim that his memory was in any way refreshed by the notes from which he read. Whether or not such notes could have refreshed his memory to the extent qualifying him to state such conversation, questions and answers, was not disclosed by the evidence. The Court held that permitting his memorandum to go to the jury by the medium of reading it was error and the case was reversed on that ground. The Court cited in its opinion the opinions of the Supreme Court above quoted from.

De Witt vs. Skinner, 232 Fed. 443, 4.

In *Parsons vs. Wilkinson, 113 U. S. 656, 28 L. Ed. 1037,* the Supreme Court held that memoranda made twenty months after the transaction was inadmissible as evidence, although the witness testified that *he knew it must have been correct when he made it,* but had no present recollection of the matters recorded in the memoranda.

It will be noted from the above that the Supreme Court has been able to discover but two uses for such memoranda, namely, its use to refresh the recollection of the witness so that he may testify to a *present* recollection of past facts and, second, the introduction of the memorandum itself as a record of the witness' recollection of facts known at some past time, when the memorandum was made; in the latter case it is necessary, according to the decisions, to show that the witness knew the record was correct when he made it and that he has no present recollection of the matters recorded there from which he can now testify independently; and on looking into the recognized authorities on the question, it will be found that such are the rules. In those jurisdictions where memoranda prepared at a past time from a witness' then recollection, concerning matters which he is now unable to recall, can be used at all, the memorandum itself is the evidence, and *if properly authenticated and vouched for by the witness* may in some jurisdictions be placed before the jury *in lieu* of a *present* recollection of these matters by the witness himself.

Mr. Wigmore, in his work on Evidence, discusses this matter very fully. *Wigmore, Evidence, Vol. 1,*

Secs. 725-764. He points out, with very full citations of authority from all jurisdictions, that in dealing with the two forms of recollection, that is, a present recollection by the witness and a past recollection which was at a former time reduced to writing, a marked difference between the two has been recognized in all jurisdictions. A witness undertaking to testify as to a past recollection, that is, undertaking to tell that which he claims once to have known but now to have forgotten, must necessarliy do one of two things: he must refresh his memory from some source, usually from some writing, or he must produce and verify a *record* of that which he once knew and substitute that for any present recollection of the facts. In the latter case he does so "by employing some record of this past recollection and adopting it as his present statement". It is also pointed out that where a present recollection is testified to, the Court may well accept imperfect and incomplete recollection of the transaction, conversation or the like because nothing better is available.

Wigmore, Section 745:

> "But where the witness goes back to a past recollection, which can less easily be tested by cross-examination, he may properly be asked for something more decided—something of the quality satisfactory in itself and not merely the best available."

Idem:

> "Again, a memorandum of that which the witness once knew but is now unable to recall, to be acceptable as evidence must be a *faithful* memorandum."

Wigmore, 738:

> "And the Court must make sure that the recollection which the witness had at the former time was *accurately* represented in the memoranda then made."

Idem, Section 746:

> "The witness must be able now to guarantee that the record *accurately* represented his knowledge and recollection at the time."

Idem, Section 747:

> "In the first place, it must make sure that this recollection was *accurately* represented in the record or memorandum then made; here several situations present themselves for solution."

From all of the foregoing authorities, it is very apparent that, as stated at the outset, there are two ways of using memoranda of a past recollection. One is to use it to refresh the memory of the witness if it will serve to do that. The other is to properly verify and *guarantee by the testimony of the witness* the record or memoranda as made while the witness' recollection was fresh at or near the time of the transaction or circumstances recorded, and *that the record so made accurately and faithfully recorded the witness' knowledge at that time;* and having done so, to offer the record itself as a substitute for testimony by the witness.

It is more than obvious that neither procedure was followed in this case. The testimony of the witness, Marie Curtis, starts out with a pretense of refreshing her recollection; but she herself disclaimed that she did

or could refresh her recollection so as to be able to state the matters about which she was asked from a *present* recollection of them. This must certainly be accepted as the state of her recollection and of her mind at that time. The Court eventually ruled, as pointed out above, that she could consult her notes and state to the jury what she found written there, and stated repeatedly in the presence of the jury that that sort of evidence was much better than the recollection of a witness. In fact, the jury must have been impressed by the repeated statements of the Court that the notebooks which the witness held in her lap were little short of infallible. The Court permitted the witness at times to read from her notebook, and at other times she, ostensibly at least, looked at the notebook and told the jury in other language what she found written there. It can hardly be contended that there is any distinction between submitting the books themselves or permitting the witness to read what was written there. At least there is no distinction which amounts to a difference. And to permit her to look at the notebook and then state to the jury, in such language as she at that moment chose to select, not any present knowledge of her own, but what she considered to be the meaning of the writing which she found, only made a bad matter worse. It should be borne in mind at all times that the witness, by her own statement, was without any present recollection of the conversation, parties present, times and other details about which she professed to testify. The books themselves were not offered in evidence and in fact the Court states, as

shown above, that they would not be admissible if offered. So we have a situation where the chief witness for the prosecution on the trial of a most serious charge of crime was permitted to testify without any present recollection of the matter which she stated, by sometimes reading and sometimes, as it were, translating, the contents of some notebooks which she herself had written at a former time. The notebooks themselves were never offered to the jury, and so the defendants had no opportunity to object to the books or their contents going into the evidence.

To resume, it is at least very doubtful that the memoranda or a verbatim reading of it could have gone to the jury as evidence, in view of the decisions of the Supreme Court above cited. And as stated, under the authorities either the witness must have qualified so as to possess a *present* recollection of the matter about which she testified, or the Government must have relied upon the memoranda itself as a substitute for her present recollection of the facts. We believe the authorities cited and quoted from admit of no other conclusion; and we believe that, as stated by the Supreme Court, the authorities are all to this effect. We submit that it was error to permit this memoranda to be used as it was used, partly read and partly translated into other language of very possibly different meaning, under the authority of the Supreme Court above cited.

But the matter does not rest here. The error complained of is graver and the rights of the plaintiffs in error were invaded to a greater extent than already

indicated. As shown above, the witness confessedly made no attempt whatever, when writing her notes from time to time as she claimed, to set down a faithful and accurate record of what she had heard and seen. She admitted that she did not record the full conversations, but selected from them such parts as she thought would be material as evidence against these plaintiffs in error. Could anything conceivable tend to a more vicious abuse of our Courts than to permit a volunteer witness to establish a system of spying upon other people, listening to their conversations, and then, for the purpose of building up a case against them upon which they might be prosecuted and convicted of crime, to set down in note-books and offer in evidence as *"faithful"* records the parts and parcels of conversations heard and of events observed, selected with a view expressly to building up a case against them? As pointed out above by Mr. Wigmore, a witness who appears in the capacity of one having no present recollection, but who claims to have had a past recollection which was at that time reduced to writing; and who thereupon undertakes to substitute such record for his own testimony presently given; hedges himself about in such a manner that he is absolutely immune to cross-examination. One might as well attempt to cross-examine his note-book. In fact, the notebook and not the person *is* the witness. It is impossible for the defense to cross-examine such a person. And as the Courts have long recognized, the least that should be expected of such a person is that he or she shall be able to state of his or her own pres-

ent knowledge that the record so prepared did faithfully and accurately embody what the witness then knew to be the conversation or happening recorded. Surely to be an accurate and faithful record, such memoranda must state *fully* what the witness knew and remembered at that time. In this case, by her own statement, the witness deliberately substituted her own judgment, or very possibly her own desires and caprice, for the discretion which a Court is supposed to exercise in admission of testimony and for the construction which a jury is supposed to place on a conversation and other matters with which her testimony dealt. She selected what she chose, wrote it in her own way, and so built up a continued story which constitutes probably one of the most remarkable pieces of testimony that has ever been offered in any Court. Plaintiffs in error, on the other hand, were compelled to come before the Court, having been denied a bill of particulars, and sit through long day sessions followed by night sessions, and with almost no chance to reflect upon the matters with which this testimony dealt, relying upon their unaided memory of the multitude of past events and transactions as against the finished and polished narrative contained in the notebooks of this woman and built up by her out of selected portions of conversations and incidents. Admittedly this narrative was written for the purpose of charging and convicting these men of crime. The jury was deprived of any opportunity to consider the other things which were said and done by these and other persons in the various conversations as characterizing the meaning

and motives involved. and were restricted to the consideration of what this witness, in the exercise of her own judgment or desires in the matter, had at a former time chosen to prepare for their edification. Again we say that no course of action could conceivably trend more certainly and viciously to the abuse and misuse of our courts of justice than that followed by this woman. Such memoranda should not be used.

Downs vs. Downs (Iowa), 101 N. W. 431.
22 C. J. 896.

We wish again to point out that the evidence under discussion was not offered by either one of the authorized and accepted methods. The offer was neither of the testimony of the witness from her present recollection, refreshed or otherwise, nor was the record claimed by her faithfully and accurately to embody her recollections at a past time. Obviously, she was not competent to testify from any present recollection, and no offer of the record of her past recollections, that is, of her notebooks, was made and no objection to such an offer was, therefore, possible to the defense. Her testimony consisted of a statement in part of what she conceived the record of her past recollection to mean. The Court made it very plain to the jury that in his judgment the record which she held before her was the very best evidence which could possibly be offered in a case of this kind. All the while the Court was referring to the notebooks themselves; but they were withheld and kept in the possession of the witness. They were never shown to the jury nor was any at-

tempt made to place them in evidence for that purpose.

And finally the witness was allowed to tell the jury what appeared in the notebooks, which were made up of matters which she herself had *selected* out of a great mass and variety of conversations which she had spied upon and which she had worked into a story of her own composition, suspiciously complete when considered as an ostensible record of portions only of such conversations. The record which she told the jury about and part of which she read verbatim was neither accurate nor faithful, was not intended to be when made, but on the contrary was intended to be such a record as would serve to convict these plaintiffs in error of the crime. It is a matter of common knowledge that portions of conversations taken from their context are necessarily misleading. If a witness were to appear in person, and upon being asked to state a conversation should state such parts of it as he chose; and being asked on cross-examination whether there was more to the conversation, should reply affirmatively; upon then being asked to state the full conversation should reply that he did not care to do so because the rest of the conversation had nothing to do with the case on trial, that testimony would be comparable and exactly the equivalent of the matters contained in Mrs. Curtis' notebooks. Those notebooks being a partial statement of what she formerly knew or claims to have known, are the equivalent of direct testimony by her from a present recollection, as to parts of the conversation. Deliberate omission by her of the rest of the conversations she listened to and other matters which

she observed is the equivalent of her refusal to state the balance of the conversation presently in her own recollection on the grounds that it has nothing to do with the case on trial. If any Court should sustain a witness in such a position, we apprehend that a Court of Appeal would make short work of reversing a judgment of conviction of crime in such a case. That is precisely what occurred here through the deliberate and intentional action of the witness, Marie Curtis, and we submit that the judgment should be reversed.

2. *Assignments Nos. 30 and 31.* These assignments deal with the testimony of Witness Kuchenbacher (Transcript, pp. 238-277). Much of what has been said concerning the testimony of Witness Curtis applies equally to the testimony now under discussion. The witness testified (Transcript, pp. 239-245) that he made some notes of various conversations, which he claimed to have listened to through the same door referred to in the Curtis testimony. on an envelope, which he characterized as "sketches", and thereafter went to his office and rewrote his notes in a book which he produced and used on the witness stand. He testified that he could not give any testimony without referring to the notes in that book; that he could not from his independent recollection give any statement of any conversations, but would have to refer to his notes. He admitted that at his office he enlarged upon the notes originally made, added to what he there had, and destroyed his original notes. He nowhere testified that his notes were correct, or that the book which

he used contained an accurate statement of his recollection at the time he wrote it. He admitted that after Mrs. Curtis left the witness stand, and before he testified, he went into conference with her concerning his evidence and her evidence already given, in spite of the fact that by Court order he had been excluded from the courtroom while Mrs. Curtis was testifying. (Transcript, pp. 249-250.) He admitted that his testimony was given by reading from his notes, not his original notes it will be observed, but the book which he had prepared at a later time, and in answer to the Court's question, stated that he would have to look at his notes in order to testify (Transcript, p. 252). Objection was made to such use of his notes, but was overruled, as shown by the foregoing citations to the Transcript.

On cross-examination, he stated that the testimony on direct examination was given entirely from his notebook (Transcript, p. 266). He also stated that he had, at the direction of the District Attorney, given testimony only as to such things as he, the witness, considered applicable and material to the case at trial (Transcript, pp. 270-271), also that he had prepared a transcript of his notes for the District Attorney's use in this case, and that the notes used had been compared when the case was being prepared for trial (Transcript, p. 275).

As in the case of Mrs. Curtis, his examination started out with an ostensible refreshing of his memory from his notes (Transcript, p. 239), but, as pointed out, it developed that he had no independent recollection of

the matters, and, following the same procedure as Mrs. Curtis, partly read and partly translated his notebook to the jury. This is made plain by merely reading his testimony. As above stated, he nowhere claimed that the notes in any way refreshed his memory, nor did he vouch for the notes as an accurate and faithful memorandum of his past recollection made while such recollection was fairly fresh.

We submit that the witness should not have been allowed to use purported notes, written up at his leisure and not shown to have been correct and faithful when made. The same rules apply as in the case of Mrs. Curtis; the notes neither refreshed his memory, nor were the notes themselves properly guaranteed as correct by the witness. He also stated that he had selected and testified to what he considered as evidence in the case. If used at all, the notes should have been offered so that a proper objection to their admission could have been made. The witness, under no circumstances, should have been permitted to state in his own language, and as he chose, what he considered the notes meant, and to select what he chose from the material originally available to him.

3. *Assignments Nos. 36 and 37.* These assignments relate to the testimony of Paul Reynolds (Transcript, pp. 277-291). The witness testified that he listened at the door in the Curtis office and made notes of a few conversations which he claimed to have heard. He first stated that he put his notes down immediately after coming to his office and was now referring to them for the purpose of refreshing his memory. Upon

examination by the defense as to the competency of his notes, however, he admitted that he was not using the original notes made by him. He further stated that first he took some notes on a piece of paper while listening, then rewrote those notes on another piece of paper and later wrote his account in a book which he used on the witness stand. He admitted that he enlarged on his notes in rewriting them, although he claimed that he wrote down the exact conversations, or all of them that he could hear, at the time of hear ing (Transcript, p. 283). He admitted that he had written more in the book used on the witness stand than he had in his original notes, or in the second copy of them, and that both the original notes and the second copy had been destroyed (Transcript, pp. 278-284). Objection was made to the use of his notes on the witness stand, and was overruled and an exception was noted. On cross-examination he stated that he "thought" he wrote down all that he remembered of what was said at the time he was listening. He finally admitted, however, that he did not have all of the conversations. (Transcript, p. 281.)

This witness' testimony is not so objectionable as that of the witness above discussed, but we submit that the witness nowhere qualified to use his notes; he nowhere stated that he did not have an independent recollection, and it is shown beyond dispute, from the authorities already cited, a witness must positively show that he has not an independent recollection.

Vicksburg Etc. Ry. Co. vs. O'Brien, supra.

Of course, until the witness denied any present recollection, and until he denied any refreshing of his memory by his notes, the question of admission of the memorandum itself would not arise.

We think the objection made to the use of his notes should have been sustained, at least until the witness was examined further as to whether or not he could testify independently of his notes. The witness did not testify to so much that there could be any presumption that he could not remember it independently. He was occupied in listening at the door on only two or three occasions, and those occasions were only a few weeks prior to the giving of his testimony.

We believe the Court erred, particularly in permitting the use of notes by this witness without any showing that he needed them.

As to the testimony of the three witnesses treated above, if the rules above stated from unquestioned authority are applicable to civil cases; if they apply in private litigation concerning mere private disputes between parties, certainly they should be applied with double force in a situation where men are placed on trial charged with serious crime. The rulings made by the Court in this case practically eliminated the defendants' right of cross examination by making such cross-examination a mere form, having neither substance nor meaning; and, if sustained, these rulings inject into the law of evidence in criminal cases the proposition that a witness designedly sent out in advance to gather evidence upon which a man may be convicted of crime, may prepare at his leisure narra-

tive statements composed of selected portions of conversations and incidents, and then sit comfortably on the witness stand, secure in the knowledge that he needs no qualification other than the ability to read what he himself has written.

The vice of such a procedure is well illustrated in this case by comparison of the testimony of the three witnesses above mentioned with that given by four other witnesses whose testimony followed immediately. Another prohibition agent was called to the stand (Transcript, pp. 291-296), one who had listened at the same door with the same ability to observe and hear what went on; his hearing was good (Transcript, p. 295), but who, contrary to the practice of the three witnesses preceding him, above discussed, produced his actual notes made immediately while the matters were more fresh in his memory than they would ever be again. Frankly he admitted that he could get only fragmentary portions of conversations. He told what he heard, and it meant practically nothing. It was as consistent with the theory of innocence, and even more so, than with the theory of guilt. He, likewise, was sent for the express purpose of gathering evidence against these defendants (Transcript, p. 296); but he neglected to spend his leisure time in writing up a book on the subject. Consequently his testimony was an exact reproduction of what he really heard, minus any enlargements added at a later date, and minus the feature of a narrative composed of "selected" portions.

Another witness, the Prohibition Director, testified (Transcript, pp. 297-300), that he was listening at the

same door on one occasion; that he could not hear much of anything, and substantially his testimony amounted to a statement that he saw, from a different vantage point opening iinto the hall of the building, certain persons moving about in the hall, among them some of the defendants.

The third, a special agent of the Department of Justice, testified that he listened at the same door giving into the Doctor's private office; that he heard a few fragmentary conversations, and no more. He was also unarmed by a previously prepared book. (Transcript, pp. 300-303.)

The fourth witness was a shorthand reporter, who qualified as competent to take down an ordinary conversation when she could hear it. She testified that she was at the door on one of the same occasions testified to by Mrs. Curtis, taking down in shorthand what she heard. She was also present at the door on other occasions. She had her notes taken in shorthand at the time (Transcript, p. 305). She was sent there for that express purpose (Transcript, p. 312). She had the same opportunity for hearing and observing as did Mrs. Curtis. She had infinitely superior ability for recording and retaining what she heard, yet (Transcript, pp. 307-311), that which she had was fragmentary, and the most of it so much so that it is impossible to read or understand it as expressing anything which can be defined or characterized. The most of it might fit into any conversation. Compared to this, we have the long, smooth and easily flowing narrative of Mrs. Curtis, which she represents to be "accurate" reproductions

of "selected" portions of conversations which she overheard and afterwards wrote into her book. We think a better demonstration of the impropriety of the procedure permitted by the Court could not be found, nor better proof of the danger inhering in permitting such testimony as that given by the witnesses Curtis and Kuchenbacher.

Another feature of Mrs. Curtis' examination appears from her cross-examination. In the course of that part of her testimony, omitting many matters about which the witness was not at all certain, she used the expression, actually or impliedly, "I don't remember", in the neighborhood of one hundred times. In each instance her answer related to a matter of importance. Her profession of acting as a witness was a mockery; the only purpose it served was that throughout the long hours during which she occupied the witness stand as a medium through which to present her written narrative to the jury, she naturally created the impression with the jury that they were listening to first hand testimony by a remarkably intelligent witness.

We most respectfully, but urgently, present that such a proceeding traverses both the rules of evidence and the spirit of the law which underlies them. No defendant can be fairly tried under such circumstances, and no defendant or his counsel could be expected to anticipate that any case against him would be presented to the jury in such a manner. The judgment ought to be reversed.

XV

Assignments Nos. 21, 22 and 23. By these assignments there is raised a question which is rather novel. The District Attorney produced before the jury (Transcript, pp. 115-128) an alleged detectaphone or detectograph apparatus; a witness was called to examine and identify the apparatus as such and to testify that the apparatus was placed in the Curtis rooms for the purpose of listening over it to conversations elsewhere. Later (Transcript, pp. 141-147), the witness Mrs. Curtis was called upon to testify that the transmitter of the apparatus connected by wires to the receiver, was placed in Dr. Goodfriend's office. After inquiring at great length about the apparatus, over objections of the defendants, the chief witness was permitted to exhibit the instrument before the jury and to explain it at length. After all of this demonstration and location of the apparatus, while the Court had under advisement an objection to any testimony concerning matters claimed to have been learned through it, based upon the ground that the placing of the transmitter in Dr. Goodfriend's office was a continuing trespass and a violation of his constitutional rights (Transcript, pp. 147-150), the District Attorney withdrew his offer in its entirety (Transcript, p. 182). In the meantime, however, the witness Curtis, and the District Attorney had frequently reminded the jury by indirection of the detectograph, and by inference had stated to the jury that evidence had been obtained over it also, in addition to what the witnesses claimed to have heard at the connecting door. This was done even to the extent

of directing witnesses to give, from their notes, only what they heard *at the door*, stating nothing which they heard over the detectograph. The suggestion that the witnesses could, if they might, tell a great deal more which was disclosed by the detectograph was too patent to be avoided, and must necessarily have led to a state of mind on the part of the jury extremely prejudicial to the plaintiffs in error. (Transcript, pp. 162, 181, 174, 177, 182, 248.) In the last instance just cited, the witness Kuchenbacher stated definitely that he had notes of conversations heard both at the door and over the detectograph.

Of course, the whole proceeding was a gradual encroachment upon the defendants' rights by stages so imperceptible that it would be hard to define them. But it is certain that the effect of the matters here complained of, in the aggregate, must have been highly prejudicial. As we have stated, there is no precedent in the matter so far as we know or have been able to learn; but we feel quite certain that the original objections to the testimony of Robin Reynolds (Transcript, pp. 116, 118, 127) ought to have been sustained. The Court should have guarded against precisely the prejudice resulting by requiring the Government to reorder its proof. The defense might then have submitted, at the outset, the objection which it was precluded from making until it was too late, that testimony based upon a trespass directed against Dr. Goodfriend's premises was inadmissible; which, if sustained, would have eliminated any demonstration before the jury or any explanation, and would have placed the matter in such

form that the subsequent reference to conversations heard over the detectograph would not have been made. Those references, made while the Court was reserving final decision on the objection last mentioned, recurred too systematically to be explained as accidents. It has long been recognized that when the same thing recurs at frequent intervals it ceases to become accidental and its existence is looked upon rather as a matter of design. But in any event, the injury was done the defendants; and under the Court's rulings, and in view of the order of proof which those rulings allowed, there was nothing the defendants could do about it but accept the situation.

We believe that these matters were prejudicial and prevented the defendants from having a fair trial, and that it should be held as error on the Court's part to permit such a display before the jury until the materiality, relevancy and competency of the proof, to which this was ostensibly a preliminary, had been determined.

See:

17 C. J., 326.

Boyd vs. U. S., 142 U. S. 450, 35 L. Ed. 1077.

CONCLUSION

Owing to the voluminous record in this case, we do not profess to have covered at all thoroughly all matters concerned in the assignments of error submitted, but we have endeavored within reasonable space to present to this Court the substantial features upon which we submit that the reversal of judgment herein should be ordered.

The outstanding features of the case, we believe, are that the search warrant proceeding directed against the Vernon Hotel, and the admission in evidence of the things seized and information there gained, was irregular and prejudicially erroneous; the purported testimony of the witnesses Curtis and Kuchenbacher was incompetent in the highest degree, and as we view the matter, around these outstanding errors were grouped a very considerable number of others which, as we have already indicated, had a cumulative prejudicial effect impossible of correction. We believe that either of the two principal matters suggested above are sufficient to require a reversal of the judgment, and we most earnestly submit that the interests of justice require that these plaintiffs in error, before they shall be required to pay a fine and suffer imprisonment, be tried anew under conditions different from those obtaining at the former trial. We submit that not only their interests, but the question of the use or abuse of our courts of justice are involved herein. We sincerely believe that the deliberate methods adopted by the principal witnesses for the Government to create a case upon which these defendants might be convicted were directed just as surely against the very bulwark of our liberties as against the persons who happened to be the subject of their endeavors.

We respectfully submit that these plaintiffs in error are entitled to a reversal of this judgment and to a new trial.

HAWLEY & HAWLEY,
J. R. SMEAD,
Attorneys for Plaintiffs in Error.